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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

SIERRA CLUB, CITIZENS FOR A BETTER ENVIRONMENT, and LEAGUE OF WOMEN VOTERS, *Petitioners,*

VS.

JAMES T. LYNN, Secretary of the U.S. Department of Housing and Urban Development, SAN ANTONIO RANCH, LTD., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on October 4, 1974, reversing the judgment of the District Court awarding attorneys' fees to petitioners.[1] The Motion for Rehearing was denied November 19, 1974.

[1]The Court of Appeals affirmed the judgment of the trial court on the merits and also reversed the judgment of the trial court retaining jurisdiction. Certiorari is sought only to review the decision of the Fifth Circuit respecting attorneys' fees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 502 F.2d 43 (5th Cir. 1974). The opinion is set forth in Appendix A, *infra*, pp. 164-209. The opinion of the District Court is reported at 364 F.Supp. 834 (W.D. Tex. 1973), and set forth in Appendix B, *infra*, pp. i-xlii. The order of the Court of Appeals denying the petition for rehearing *en banc* is set forth in Appendix C, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 4, 1974, and a timely petition for rehearing *en banc* was denied on November 19, 1974. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was appropriate for the District Court, in the exercise of its inherent power of equity, to award attorneys' fees to attorneys for parties whose litigation caused vital reports concerning the environmental effects of the proposed project to be prepared, thereby insuring that the governmental agency charged with the duty of preparing a legally adequate environmental impact statement could fully evaluate the proposed project and take steps to prevent significant environmental damage to an aquifer supplying water to the City of San Antonio?

2. Where significant measures affording environmental protection were made applicable to the project as a result of the litigation, whether it is appropriate for a trial court, in the exercise of its inherent powers of equity, to impose liability for such attorneys' fees upon a project proponent, who initiated a project for his own private gain, without analyzing serious environmental consequences which such project might produce?

STATUTE INVOLVED

National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*

STATEMENT

The petitioners sought declaratory and injunctive relief barring the defendants, Secretary of the Department of Housing and Urban Development (HUD) and the developer, San Antonio Ranch Ltd., from issuing or accepting a guarantee for an 18 million dollar private bond issue for the development of an 88,000 person planned residential community, pursuant to Title VII of the Urban Growth and New Community Development Act of 1970, 42 U.S.C. 4501 *et seq.*, until the project complied with the requirements of that Act, the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.* The project proposed to "convert 9,138 acres of predominantly virgin Texas hill country land

in the northwest quadrant of Bexar County, Texas into a 'free standing' new community of 87,972 residents living in 28,676 housing units." 502 F.2d at 48. The site is "presently undisturbed and primarily used for ranching, grazing, and occasional hunting." *Ibid.*

The gravamen of petitioners' allegations concerning the environmentally harmful consequences of the Project was that the proposed development lay astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. 502 F.2d at 48-49. This artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. 502 F.2d at 49. Petitioners contended that any pollution arising from urban runoff, pesticides, leaking sewers, and other such sources would likely reach the water supply and degrade the water in the Aquifer.

After application by the developer for a loan guarantee, on February 23, 1972, HUD made an offer of commitment to the developer contingent upon the developer's agreement to specific conditions. On the same date, petitioners filed their complaint in this action and sought a temporary restraining order, declaratory and injunctive relief.

In an order dated June 28, 1973 (antedating its final memorandum opinion), the District Court noted that the "final" Environmental Impact Statement filed by HUD before the commencement of the litigation

"did not, in truth and in fact, fully comply with the law." 364 F.Supp. at 849. There were substantial additions to the EIS after the litigation was commenced but before the Court's final decision. These additions were the result of "further extensive study, research, public discussion, and planning on the part of HUD, as well as many other governmental agencies and private parties." 364 F.Supp. at 849.

On July 17, 1973, the District Court issued its decision on the merits after trial. The District Court denied the relief sought by plaintiffs on the merits and entered judgment for the defendants, concluding that HUD had now complied with the provisions of each federal statute in question and that the Secretary's action was not arbitrary, capricious, or an abuse of discretion, nor otherwise not in accordance with law. The District Court further held that the Court should retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards were fully instituted and implemented. Finally, counsel for the plaintiffs were awarded $20,000 in attorneys' fees and costs, to be paid by the defendant developer. 364 F.Supp. 834.

In support of its award of attorneys fees against the developer, the Court stated:

> [T]his Court is of the firm belief that equity dictates the award. At the commencement of this suit on February 23, 1972, comparatively little of the information subsequently made public had been made available to the general citizenry . . . Over the months that followed, many studies and hearings were conducted which inquired into the

> feasibility of the SAR Project, and what, if any adverse effects it might have upon the Edwards Underground Reservoir . . . In light of the reams of material published after this Court's Order of March 14, it is difficult to conclude that the filing of the suit did not help to ensure that adequate precautions would be taken to protect South Texas' very valuable water resource and that the measures taken would be made available to the scrutiny of the public eye . . . [F]rom the time the injunction in this case was originally filed to the time the trial was completed, the facts and record had changed so substantially as to make this an entirely different lawsuit . . . Essentially the plaintiffs forced heretofore untested hypotheses to be subject to rigorous study which did in fact reveal the project to be safe, *forcing both the government and SAR to do what they should have done of their own initiative in the first place, before the Final Environmental Impact Statement was issued . . .*
>
> *Sierra Club v. Lynn,* 364 F.Supp. at 847, 848, 849, 850 (emphasis added)

In reversing the determination of the District Court granting an award of attorneys' fees to the petitioners, the Court of Appeals expressly noted that the question presented herein was "identical to the question in *Wilderness Society v. Morton,* 495 F.2d 1026 (D.C. Cir. 1974)." However, the Court of Appeals declined to follow the decision in *Wilderness Society.* 502 F.2d at 65. The Court of Appeals further noted that although the litigation prosecuted by the petitioners had yielded substantial benefits to the public, none of the

benefits had inured specifically to the developer. 502 F.2d at 66. Since the developer could not pass along the costs of the attorneys' fees to the public at large which had been benefited (all members of the public who draw their water from the Edwards Aquifer),[2] the Court of Appeals determined that the award of attorneys' fees would not be proper, unless the private developer had "controlled the government agency's actions or caused its default." 502 F.2d 66. The Court of Appeals further determined that the developer breached no legal duty in this case, since the burden of compliance with the National Environmental Policy Act and the New Community Development Act was on HUD.

REASONS FOR GRANTING THE WRIT

1. The question as to whether it is appropriate for a trial or appellate court, in the exercise of inherent powers of equity, to award fees to attorneys for parties whose litigation caused substantial improvements to be made in a patently inadequate Environmental Impact Statement and who thereby caused substantial changes to be made in such project so as to mitigate possible environmental harm, is presented in *Alyeska Pipeline Service Company v. The Wilderness Society, et al.*, No. 73-1977, now awaiting decision by this Court. That case further raises the question whether an award of attorneys' fees against a

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[2]The project itself would draw water from the Aquifer, and the prospective residents and purchasers of homesites are among the beneficiaries of petitioners' litigation.

project proponent participating in litigation, where significant changes were made with regard to the environmental protections applicable to the project as a result of the commencement and prosecution of the litigation, is proper. The issues posed by both cases require similar treatment and warrant petitioners' request that this Court defer ruling on this petition pending final determination of *Alyeska Pipeline Service Company v. The Wilderness Society, supra.*

2. Here, as in *Alyeska Pipeline,* the project proponent initiated the governmental action which the court was being requested to review. The litigation stemmed from actions and decisions which were made by the project proponent; and the project proponent, named as a defendant, participated in the litigation as a major and real party in interest, carrying a major burden in the litigation. The District Court, which determined that a fee award was appropriate, based its ruling upon the particularized equitable factors present in the case and upon the substantial benefits which were conferred upon the public by the prosecution of the litigation. The determination thus was made by a trial court uniquely immersed in the facts of the case and should not be overturned absent an abuse of discretion.

Both the District Court and the Court of Appeals agree that the litigation vindicated important Congressional policies; that it conferred substantial benefits on the users of the aquifer; that these substantial benefits would not have been realized had it not been for the litigation, and that the litigation, undertaken

for no economic gain, placed heavy burdens on petitioners and their counsel. Given these circumstances, it was proper for the District Court to shift the burden of paying the fees of the petitioners to the project proponents, where the project was conceived to promote the private economic interests of the proponents and where the litigation resulted from the decision of the project proponent to seek a federal loan guarantee from HUD.[3]

Moreover, the District Court was correct in concluding that the advancement of an important legislative policy justifying a fee award can be accomplished even where a party does not obtain the ultimate relief sought by the lawsuit. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, at 396 (1970). The Fifth Circuit did not disagree with the District Court in this respect; its decision was based solely on its disagreement with the holding in the *Wilderness Society* that such fees may equitably be imposed upon the project proponent.

To the extent that the Court of Appeals held it inappropriate for the trial judge to award attorneys' fees since such fees could not be passed along to all beneficiaries of the litigation, that decision is incon-

[3]In this case, HUD and Secretary Lynn were immunized from an award under 28 U.S.C. 2412. This statute operates similarly to immunize other Federal agencies and their officers. In *Alyeska Pipeline, supra,* the Secretary of Interior was similarly immunized. The Court of Appeals for the District of Columbia found this statutory immunity to be no bar to the award of fees against the project proponent.

sistent with *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939), wherein this Court approved attorneys' fees awarded against both beneficiaries and non-beneficiaries of the litigation. Equity does not demand a precise or perfect fee shifting mechanism. In *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the Court allowed an award of attorneys fees against some ultimate beneficiaries when other beneficiaries were not required to pay—precisely the situation in the present case. Here future residents of the development will depend on the aquifer for their water supply. The developer will thus be able to pass along the costs of attorneys fees to purchasers of lots and homes who will have been benefited by the petitioners' lawsuit.

Just last Term, this Court recognized that "the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important policies." *F. D. Rich Co. v. United States,* 40 L.Ed.2d 703 at 714 (1974). Thus this Court is aware that in some cases private enforcement of Congressional policies requires a mechanism which mitigates the costs of litigation. The factors relied upon by the District Court in this case included "overriding considerations" which justify a fee award "in the interests of justice." *Mills v. Electric Auto-Lite Co.,* 396 U.S. at 391; *Hall v. Cole,* 412 U.S. 1, at 5 (1973).

CONCLUSION

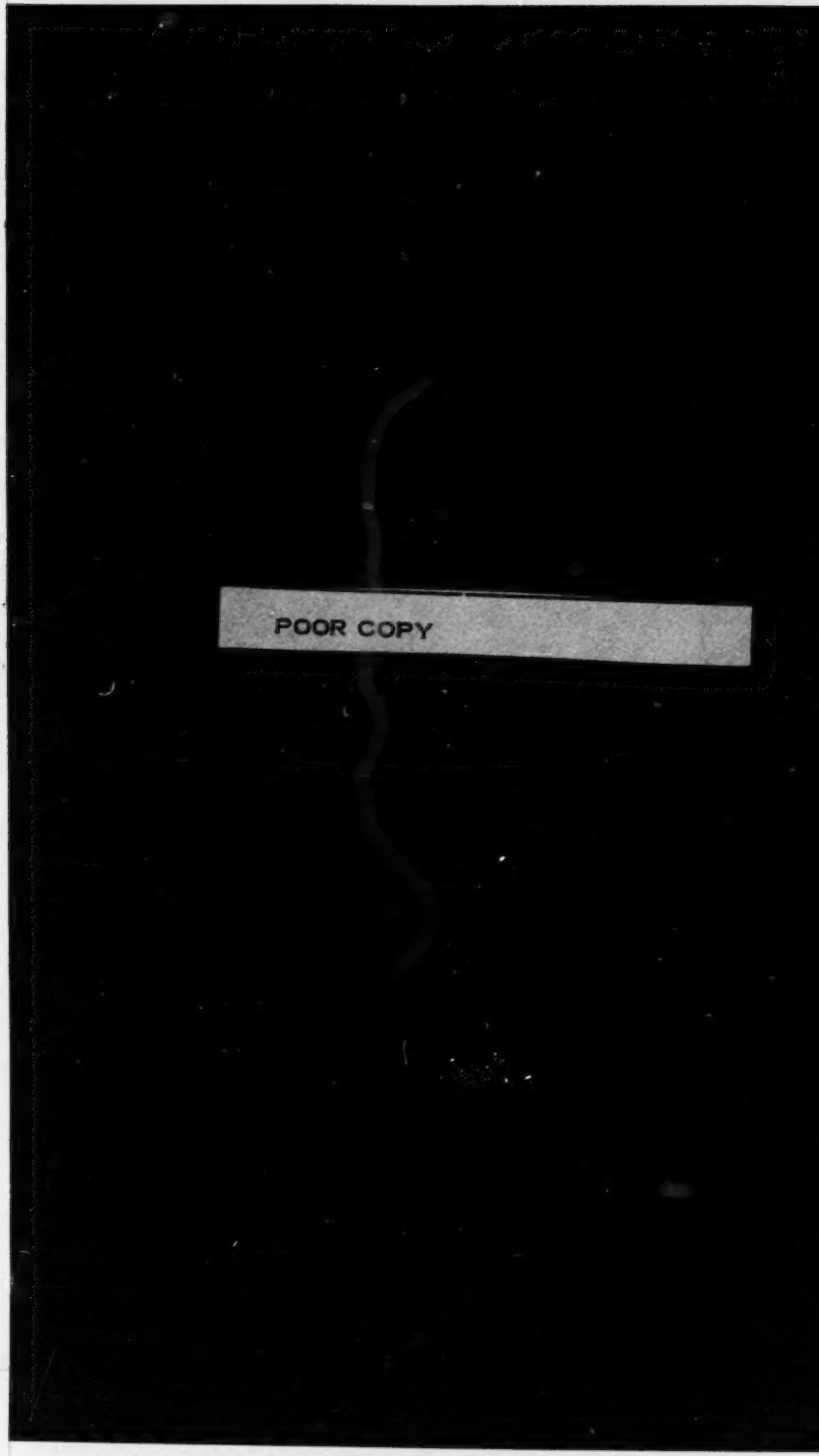
For the reasons stated above, petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted. It is respectfully suggested that the Court defer ruling on this petition pending final determination of *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.*, No. 73-1977.

Dated, San Francisco, California,
February 12, 1975.

Respectfully submitted,

JOHN D. HOFFMAN,
LAURENS H. SILVER,
Sierra Club Legal Defense Fund,
Attorneys for Petitioners.

(Appendices Follow)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SIERRA CLUB et al., Plaintiffs-Appellants-Cross Appellees,

Edwards Underground Water District et al., Intervenors-Appellants-Cross Appellees,

v.

James T. LYNN, Secretary of the U. S. Department of Housing and Urban Development, et al., Defendants-Appellees-Cross Appellants,

San Antonio Ranch, Ltd., Defendant-Appellee-Cross Appellant,

Texas Water Quality Control, Intervenor.

No. 73–3378.

United States Court of Appeals, Fifth Circuit.

Oct. 4, 1974.

Citizens groups brought action for declaratory and injunctive relief with respect to development of new community under housing and urban development program. State Water Quality Board intervened on behalf of defendants, and underground water district intervened with county on behalf of plaintiffs. The United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, 364 F.Supp. 834, entered orders and appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that Secretary of HUD acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant developers of the new community federal assistance under the Urban Growth and New Community Development Act; that environmental impact statement filed by HUD was

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sufficient; that plaintiffs failed to state claim under the Water Pollution Prevention and Control Act; that in absence of proof that developer controlled the government agency's actions or caused its default, it could not be cast in judgment for attorney fees; and that as there remained no unadjudicated claim upon which relief could be granted, trial court improperly retained jurisdiction.

Affirmed in part, reversed in part and remanded.

1. United States ⇐53(9)

Judicial review of decision of Secretary of HUD to guarantee financing for initial development of new community was governed by the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 706(2)(A); 28 U.S.C.A. § 1331(a).

2. United States ⇐53(9)

Appropriate standard of review of decision of Secretary of HUD to guarantee financing for initial development of new community was whether the Secretary's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and reviewing court would determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represented a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

3. United States ⇐53(9)

Where none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes in deciding to guarantee financing for new community were unavailable to plaintiffs or within the exclusive possession or undisclosed by the agency, trial court properly required plaintiffs to establish their claims by a preponderance of the evidence as to each of their claims. 5 U.S.C.A. § 706(2)(A).

4. Courts ⇐406.3(24)

Findings, in action to prevent development of new community pursuant to program of housing and urban develop-

ment, that HUD did not act arbitrarily, capriciously or unlawfully when it found the community to satisfy each statutory condition for federal financing guarantee were not clearly erroneous. New Communities Act of 1968, § 402 et seq., 42 U.S.C.A. § 3901 et seq.; Urban Growth and New Community Development Act of 1970, §§ 701–703, 712, 42 U.S.C.A. §§ 4501–4503, 4513.

5. Health and Environment ⇐25.5

HUD's commitment to guarantee $18,000,000 in bond obligations for development of new community pursuant to program of housing and urban development constituted a "major federal action" significantly affecting the quality of the human environment, subjecting that decision to the full disclosure provisions of the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

See publication Words and Phrases for other judicial constructions and definitions.

6. Health and Environment ⇐25.10

Council on Environmental Quality guidelines providing 30-day period for circulation of impact statement for public comment, although highly persuasive, do not govern compliance with the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

7. Health and Environment ⇐25.10
United States ⇐53(9)

HUD's commitment to guarantee bond obligations for new community, and HUD's environmental impact statement, were not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

8. Health and Environment ⇐25.10

The National Environmental Policy Act does not permit the responsible federal agency to abdicate its statutory duties

by reflexively rubber-stamping an environmental impact statement prepared by others; the agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

9. Administrative Law and Procedure ⇐476

In absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant.

10. Health and Environment ⇐25.10

Guidelines of Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of environmental impact statements contemplate submission of initial environmental information by the applicant to the agency. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

11. Health and Environment ⇐25.10

HUD did not improperly delegate its statutory responsibilities in preparing environmental impact statement for new community by reason of the participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

12. Health and Environment ⇐25.10

Inasmuch as district court's order holding in abeyance litigation concerning development of new community under housing and urban development program and developer's agreement to HUD's call for a moratorium on construction effectively maintained the status quo pending completion of addendum to HUD's environmental impact statement, it was not incumbent on court to require that HUD withdraw its

contingent commitment offer. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

13. Health and Environment ⇐25.10

While formally correct environmental impact statements and technical compliance with the National Environmental Policy Act and complimentary guidelines are required, an initial finding of noncompliance must not irrevocably preclude eventual compliance; compliance must be measured by the contents of the final statement. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

14. Health and Environment ⇐25.10

HUD's environmental impact statement for new community was not insufficient on theory it failed to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; to set out a cost-benefit analysis of the project; to consider cumulative impacts; to discuss adequately the relationship between local short-term uses of the environment and maintenance and enhancement of long-term productivity; or to treat fully outside comments and opinions. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

15. Health and Environment ⇐25.10

That factors in determining environmental costs and risks with respect to development of new community under housing and urban development program are generally imprecise and unquantifiable does not render impact statement inadequately detailed. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

16. Health and Environment ⇐25.5

National Environmental Policy Act does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

17. Health and Environment ⇐25.10

Sufficiency of environmental impact statement under the National Environmental Policy Act must be judged in light of the nature of the federal action and the underlying implementing federal legislation. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

18. Health and Environment ⇐25.10

Agency providing environmental impact statement must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

19. Health and Environment ⇐25.10

HUD's environmental impact statement with respect to development of community lying on portion of zone of land taking surface waters to underground water-bearing formation supplying water for city of San Antonio was not insufficient by reason of failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

20. United States ⇐53(9)

Statute permitting HUD to plan large-scale projects on federally owned lands does not obligate HUD to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counterproposal of its own before it can pass on the merits of a properly submitted new community application. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

21. Health and Environment ⇐25.10

HUD's environmental impact statement pertaining to new community application fully complied with the National Environmental Policy Act where it furnished sufficient information to permit a reasoned choice of alternatives so far as

environmental aspects were concerned. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

22. Health and Environment ⇐28

Precautions required by HUD to protect quality of water supplied to residents of city of San Antonio by area on which new community was to be constructed were adequate. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

23. Health and Environment ⇐28

Citizens' groups suing to prevent development of new community to be located astride portion of zone of land supplying water to city of San Antonio failed to state claim for violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(a), 102(a), 301, 309, 33 U.S.C.A. §§ 1251 et seq., 1251(a), 1252(a), 1311, 1319.

24. Federal Civil Procedure ⇐2737.6

In absence of proof that the private party controlled the government agency's actions or caused its default, private party cannot be cast in judgment for attorney fees as a result of the agency's shortcomings even if agency is immune from liability for financial redress.

25. Federal Civil Procedure ⇐2737.6

Citizens' groups which brought action which directly caused HUD's full compliance with National Environmental Policy Act on new community project could not recover attorney fees from developer which successfully defended the lawsuit and which was not shown to have been unreasonable or to have unduly protracted the litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 28 U.S.C.A. § 2412.

26. Courts ⇐30

Rendition of definitive judgment in suit to prevent development of new community under housing and urban develop-

ment program ended the litigable aspects of the dispute and, in absence of evidence indicating that HUD would fail to discharge faithfully its statutory functions, trial court improperly retained jurisdiction. 28 U.S.C.A. § 1331(a).

27. Health and Environment ⇐25.5

District court must abjure the role of a quasi-administrative agency for environmental affairs. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

28. United States ⇐53(9)

Judgment and grant of relief disposing of litigation seeking to prevent development of new community under housing and urban development program could compel parties to file in a convenient local public office such reports as they might in the future make that contain material of public interest. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

29. Courts ⇐281

Although mere voluntary cessation of allegedly illegal conduct does not moot a case, federal jurisdiction must be founded upon at least a mere possibility of recurrence which serves to keep the case alive.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

An offer of commitment by the United States Department of Housing and Urban Development (HUD) to guarantee an 18 million dollar private bond issue for the development of San Antonio Ranch New Town (Ranch) spawned this environmentalist litigation against defendants James T. Lynn, Secretary of HUD, and San Antonio Ranch, Ltd., the developer.

Charging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 et seq., four citizens groups (the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch) and their individual members, as plaintiffs, sought declaratory and injunctive relief barring defendants from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the Ranch until the proposed project complied with NEPA and Title VII. Thereafter, the district court permitted the Texas Water Quality Board to intervene on behalf of the defendants, and the Edwards Underground Water District, which had intervened along with Bexar County, Texas on behalf of the plaintiffs, amended its original complaint to allege that development of the Ranch also contravened the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq.

Depending upon which party's view is accepted, the Ranch will be either an urban planner's utopia incarnate or an environmental disaster of the first magnitude. As conceived by the developer, a limited partnership composed of individuals experienced in real estate, construction, financing and new town management, the Ranch will convert 9,318 acres of predominantly virgin Texas hill country land in the northwest quadrant of Bexar County, Texas into a "free standing" new community of 87,972 residents living in 28,676 housing units (41%—single family detached houses, 6%—townhouses, 45%—medium density apartments, and 8%—high density apartments), of which one-fourth will accommodate low and moderate income families, through staged construction over a 30-year period. The Ranch site, which is presently virtually undisturbed and primarily used for ranching, grazing and occasional hunting, is dominated topographically (85%) by hill country and rocky soil characterized by 100 to 200 ft. differen-

tials in elevation. The southern, 1200 acres (15%) consists mainly of flat terrain and agriculturally productive soil. An expanding network of regional highways serving the area will be supplemented by an external mass transit system connecting the Ranch to downtown San Antonio, approximately 20 miles away, the South Texas Medical Center, a distance of 10 miles, the University of Texas at San Antonio, a 6-mile trip, and the San Antonio International Airport, currently a 25-minute drive. The developer will contract for essential municipal services and public utilities with the City of San Antonio, whose City Council has adopted a resolution favoring eventual annexation of the entire project.

More than half of the Ranch acreage will be devoted to residential development and internal roads. The project contemplates over 2200 acres of open space, which includes a 2,000 acre greenway system, two 18-hole golf courses, three recreational use lakes, neighborhood recreation centers with swimming pools and tennis courts and a continuous hiking and bicycle trail system. 12,750 employees are expected to work in two industrial and research and development parks totaling 1,234 acres. A 500 acre vocational training and technical center, featuring public or private affiliated educational and training facilities, will staff 430 employees, and it is estimated that 4,480 persons in public jobs will service the Ranch population. Of the 180 acres set aside for commercial use, 150 acres will be devoted to a town center that will act as the gateway to the entire Ranch, providing the focus of civic, entertainment, office employment and shopping activities. Two educational parks and 13 elementary school sites will cover 330 acres. In general the land use plan seeks to take maximum advantage of the area's variation in topography by clustering common or public facilities along an "activity belt," a major right-of-way loop that envelopes the community and laces its components together. The center of the Ranch forms a residential island and the network of canyons affords the basis for a continuous green belt system that will permit a person

to bicycle or walk or horseback ride from the town center to any point within the Ranch without crossing a major thoroughfare.

The spectre of environmental doom is raised by the fact that the proposed development lies astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. The aquifer region has been estimated to be approximately 175 miles in length with a varying width of 5 to 45 miles, encompassing a crescent-shaped surface area of 3½ million acres that extends over more than 7 counties. Ground water flows freely (in terms of miles per day) in an easterly direction through the Edwards formation of extremely permeable limestone, which averages 500 feet in thickness, until it is cut by the Balcones fault system. Northwest of the fault the surface limestone is upthrown to form the Edwards Plateau. In this region, honeycombed with fissures and cracks, ground water percolates through the stratum and is found under normal, unconfined water-table conditions. Southeast of the fault line, however, the limestone formation is downthrown, sloping from a surface recharge area near the fault line south and east hundreds of feet below the surface, and overlaid with less permeable and younger rocks, which confine the ground water in the underground reservoir from which San Antonio draws its water supply.

The artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. Most of the recharge is attributable to 14 surface streams on the Edwards Plateau that flow across fractures and joints in the fault zone, through which water filters down to the aquifer. This recharge zone varies in width from ½ to several miles and extends 80 or more miles above the Balcones fault system. It consists of many small pores and fissures inlaid among less permeable material. The second major source is underflow from one area of the reservoir that recharges

another. Least significant is the recharge produced from rain falling directly on the exposed "outcrops" of limestone in the upthrown region. This precipitation seeps through honeycombed passages and eventually filters its way into the reservoir.

Plaintiffs contend that if water entering the recharge zone is polluted, the entire aquifer will become contaminated. The Balcones Fault dissects the Ranch site latitudinally at the Haby Crossing Fault. Only about 13% of the annual rainfall on the site is eventually introduced to the underground reservoir. The rest is consumed by vegetation, evaporated or removed as surface run-off. Since none of the 14 major stream beds or recharge areas is located on the Ranch, the recharge emanating from the Ranch is generally estimated at only one-half of one percent of the total annual recharge to the aquifer.

The Ranch moved from the drawing board to the bureaucracy when the developer approached HUD in February of 1970 to explore the possibilities of federal assistance under Title VII. Marketing studies had shown that the development envisioned by the preliminary master plan would capture 15% of Bexar County's projected growth. During the prior decade almost half of the county's total population increase (143,000) had occurred in the northwest quadrant, whose influx of residents was expected to continue. Favorably impressed with the planning studies and pre-application proposal, HUD invited the developer to submit a formal application. Eight months later HUD's Office of New Community Development received the formal application and fee of 5,000 dollars and undertook a full agency review of the project.

Early concern for the integrity of the aquifer surfaced in many quarters. At HUD's suggestion the developer retained a geologist-hydrologist, Dr. L. J. Turk, to examine the project. A review of the Ranch was conducted by the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives from the

Edwards Water District, Bexar County and the 11 surrounding counties, which endorsed the project subject to two subsequently adopted conditions: (1) that HUD require thorough environmental impact studies, particularly as to the effect of storm water run-off; and (2) that the sanitary sewer system of the Ranch be connected and treated off the site by the City of San Antonio's regional waste water system. The Texas Water Quality Board and San Antonio city officials were informed of and commented upon the environmental hazards to the aquifer and the steps being taken to protect it. A team of HUD New Community Development staff members, including a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, was formed to prepare an environmental impact statement. The internal agency review of the Ranch's application culminated in a favorable Title VII critique of the project by the Assistant HUD Secretary for Community Planning Development, who submitted his report to the Board of Directors of HUD's Community Development Corporation in August of 1971 before the draft impact statement was circulated for public comment on September 13.

Of 13 public agencies solicited, 7 submitted written comments that were incorporated with comments volunteered by 9 other agencies or groups, including some of the plaintiffs, into the "final" impact statement issued on January 20, 1972 for further circulation and public comment.[1] Just over one month later, on February 23, 1972, convinced that the Ranch was eligible under the Act for a federal financing guarantee of up to 18,000,000 dollars, HUD proffered an offer of commitment that was contingent upon, *inter alia*, the developer's agreement to (1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a compre-

1. In December of 1971 the Edwards Underground Water District, the San Antonio Independent School District, the Bexar County Commissioners Court and the San Antonio River Authority adopted resolutions opposing urban development over the aquifer. Each resolution was included in an August 1972 addendum to the final environmental impact statement.

hensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board.

On the same date plaintiffs filed their complaint in this action and sought a temporary restraining order. Without reaching the merits, the district court granted defendants' motion to hold the case in abeyance until the developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD. Subsequently, HUD formed the San Antonio Water Quality Advisory Review Board, composed of representatives from 18 public agencies and Bexar County, which conducted four separate public meetings and examined the impact of the project on the aquifer. This group inspected four reports submitted by Dr. Turk and the developer's other experts concerning continued studies of storm water and ground water quality at the Ranch, geological mapping of the site and soil renovation of storm water. It also surveyed the developer's plans for sanitary sewage collection and treatment facilities; transportation and storage of dangerous liquids; solid waste storage, collection and disposal; storm water controls; water quality monitoring system; and the legal controls supporting the inspection and enforcement of environmental quality programs.

In addition, HUD retained Dr. Henry V. Beck, a Kansas State University geologist, who, assisted by associates with expertise in environmental health engineering, hydrology and soil mechanics, independently reviewed the environmental studies and aspects of the entire project. Citations of approv-

al of the Ranch by the advisory board and Dr. Beck and their recommendations for improving environmental controls over the aquifer and the water quality monitoring system were forwarded to HUD for consideration and inclusion with additional ecological and the underlying scientific studies in an addendum to the "final" impact statement, which was circulated on August 24, 1972 among 38 public agencies or groups for additional study and comment. The Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the Texas Water Quality Board, the Governor's office and the State Department of Health approved the project as environmentally sound and consistent with regional land use planning. In October HUD concluded that the developer had satisfied each of the conditions contained in the letter of commitment and proceeded to commence negotiations leading to a project agreement.

After lengthy pre-trial maneuvering and assimilation of 9 days and 1920 pages of trial testimony, which generated voluminous exhibits, including a seven volume administrative record and three impact statements, the district court denied the relief sought by plaintiffs and entered judgment for the defendants, concluding that HUD had complied with the provisions of each federal statute. Furthermore, the court resolved to retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards are fully instituted and implemented, and to require the parties to file with the court copies of all data and reports relating to the Ranch and other developments in the surrounding area. Finally, counsel for the plaintiffs were awarded 20,000 dollars in attorneys' fees, costs and expenses to be paid by the defendant developer. Sierra Club v. Lynn, 364 F.Supp. 834 (W.D.Tex.1973).

Plaintiffs appeal from the decision on the merits for defendants, renewing each of their statutory contentions, and asserting that the court improperly saddled them with the burden of proof. They also appeal from the amount of the attorneys'

fees award. The developer cross-appeals from the grant of such fees against it, and Secretary Lynn cross-appeals from the district court's determination to retain jurisdiction. For the reasons that follow, we affirm the decision of the court below on the merits, and reverse its award of attorneys' fees and its retention of jurisdiction.

[1, 2] The district court correctly ruled that it was vested with jurisdiction under 28 U.S.C. § 1331(a) and that plaintiffs possessed standing, *see* Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It also properly concluded that judicial review of the Secretary's substantive Title VII decision to guarantee financing for initial development of the Ranch project is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. Since neither Title VII nor the APA requires the agency to conduct a hearing or make formal findings when passing on new community applications, the appropriate standard of review is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under this standard the appellate court must determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represents a clear error in judgment.

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Commission, 146 U.S.App. D.C. 33, 449 F.2d 1109, 1115 (1971).

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93

S.Ct. 2749, 37 L.Ed.2d 160 (1973). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971).

[3] In a motion to the trial court plaintiffs asserted that "once a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement." Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973), reversed sub nom., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). Without formally responding the district court apparently applied the standard burden of proof—plaintiffs were required to establish their claims by a preponderance of the evidence without any tactical shifting of that burden. Since none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes were unavailable to the plaintiffs or within the exclusive possession of or undisclosed by the agency, the district court properly imposed the standard evidentiary burden on plaintiffs as to each of their claims. Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974); *see* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

I.

The Urban Growth and New Community Development Act

Increasing concern over the deterioration of urban life led Congress to enact The Urban Growth and New Community Development Act as Title VII of the Housing and Urban Development Act of 1970, Pub.L. No. 91–609, 84 Stat. 1791, expanding a similar program that was authorized by the Housing and Urban Development Act of 1968, see 42 U.S.C.

§ 3901 et seq. Over the last century the increasingly mobile quality of life in America has produced a pattern of population redistribution in which the migration of persons from rural areas to a small number of densely populated, congested central cities is followed by the flight of middle and higher income families and businesses from these urban centers to the suburbs. This pattern of movement has resulted in a polarization of the residents of city and suburbia by income, race, education, social philosophy and life style.

In order to treat the source rather than the symptoms of such social, economic and environmental problems, Title VII was designed (1) "to provide for the development of a national urban growth policy," 42 U.S.C. §§ 4501–4503, and (2) "to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, ... and communities in predominantly rural areas . . . [and] the prudent use and conservation of our natural resources by assisting public and private efforts in the development of well-planned, comprehensive new communities that will contribute to better environments, produce improved living conditions, add to the supply of adequate housing, especially for persons of low and moderate income, promote sound economic growth and employment and provide a viable alternative to disorderly urban growth. 42 U.S.C. § 4501; *see also* 42 U.S.C. § 4511(f). To achieve its broad commitment, Congress envisioned that the federal government, acting through the Community Development Corporation, 42 U.S.C. § 4532, would assist four general types of new communities:

(1) Economically balanced new communities within metropolitan areas, which would serve as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments to help renew central cities, including the development of areas adjacent to existing cities, in order to increase their tax base; and

(4) Free standing new communities where there is a clear showing of economic feasibility, and which would be built primarily to accommodate expected population growth.

H.R.Rep. No. 91–1556, U.S.Code Cong. & Admin.News, 91st Cong., 2d Sess., at pp. 5582, 5587–5588 (1970). As a result of its study of the problem, Congress found that the development of such new communities on a national scale had been crippled by the financial and administrative difficulties "of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors," Sierra Club v. Lynn, *supra*, 364 F.Supp. at 838; *see* 42 U.S.C. § 4511(e). Thus Congress provided in the Act for several forms of federal assistance including guarantees of the debt obligations of public and private new community developers to assist in financing land acquisition and development and in constructing public facilities, 42 U.S.C. § 4514.[2]

2. The eligibility requirements for Title VII financing guarantees are codified at 42 U.S.C. § 4513:

> (a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—
>
> (1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;
>
> (2) will be economically feasible in terms of economic base or potential for economic growth;
>
> (3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;
>
> (4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, hous-

After a developer has successfully traversed the application process and accepted an offer of commitment, the terms and conditions under which he must operate are negotiated with HUD and executed in a project agreement. A trust indenture and a development plan are required and must set out (i) all physical, environmental, planning and construction commitments over the 30-year development period, (ii) social goals and special features of the project, (iii) special studies required of the developer with respect to technological innovations and other aspects of the project incapable of resolution prior to execution, and (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, are enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in

> ing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;
>
> (5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;
>
> (6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;
>
> (7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and
>
> (8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.
>
> (b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion.

any part of the development plan require approval by the Secretary.

The dynamic nature of the project's development process is intended to encourage flexibility in planning and to take advantage of new technology, research and innovation in the design and execution of new community development. A specific provision in the plan, which states that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969," assures that other federal agencies retain influence over the developer's activities regarding environmental quality after the agreement has been executed. Moreover, another provision extends the developer's commitment to maintain environmental quality control for such additional period of time after completion of development as the Secretary may determine to be appropriate, and HUD states that it will prepare draft and final environmental statements with respect to any subsequent major actions connected with any such project, *i. e.* actions that have significant environmental quality implications.

[4] Plaintiffs contend that the Ranch (1) does not comport with the eight goals of the national urban growth policy announced by Congress;[3] (2) will promote the ten undesirable consequences which Congress found to result from unregulat-

3. (d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

ed patterns of urban development,[4] and (3) fails to meet the eligibility requirements for federal assistance under the Act. The district court concluded that HUD did not act arbitrarily, capriciously or unlawfully when it found the Ranch to satisfy

> (4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;
>
> (5) develop means to encourage good housing for all Americans without regard to race or creed;
>
> (6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;
>
> (7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and
>
> (8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.
>
> 42 U.S.C. § 4502(d).

4. (b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.

42 U.S.C. § 4511(b).

each section 4513 condition for the 18,000,000 dollar federal financing guarantee.[5] None of these district court findings can be characterized on this record as clearly erroneous. Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his substantive decision. Neither creates any judicially enforceable rights.

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists),

5. The findings were:
(1) The project will provide an alternative to disorderly urban growth;
(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;
(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;
(4) It is consistent with comprehensive physical and social planning;
(5) It has received all governmental reviews and approvals required by State or local law;
(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;
(7) It makes substantial provision for housing within the means of persons of low and moderate income;
(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and
(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.
Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial,

economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with the planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town community in San Antonio regardless of the final action it took as to the Ranch.

Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . .," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513(a)(5).

At the project's inception, no governmental entity exercised planning authority over the proposed site. "[N]either governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839. Bexar County, which was the only governmental body with jurisdiction over the entire ranch, had only residential subdivision regulations. Consequently, HUD selected the Ala-

mo Area Council of Governments to conduct a review of the Ranch in compliance with the Office of Management and Budget Circular A–95, which in general requires that an applicant for Title VII assistance notify the appropriate clearing house for the area in which the project is located of its intent to apply for such assistance in order to afford the clearing house and other interested local agencies an opportunity to comment on the proposed project. The district court determined that "the Alamo Area Council of Governments . . ., the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that [the Ranch] was consistent with the comprehensive regional plan." 364 F.Supp. at 839.

Title VII does not state that the existence of a comprehensive regional land use plan is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency.*" Proposed HUD Reg. § 32.7(f), 36 Fed.Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.

Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A–95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water District and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed.Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

II.

National Environmental Policy Act of 1969

[5] NEPA was enacted to promote a national policy of "productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, by demanding attention to environmental values and instituting an implementing methodology which would assure that these values were incorporated in agency planning and decision making processes. Because HUD's commitment to guarantee 18,000,000 dollars in bond obligations for the Ranch constituted a major federal action "significantly affecting the quality of the human environment," that decision became subject to the "full disclosure" provisions of NEPA, 42 U.S.C. § 4332(2)(C). As a result HUD filed three environmental impact statements—a draft statement on September 13, 1971, a final statement on January 20, 1972, and an addendum to the final statement on August 24, 1972.

The district court concluded that the final statement, as supplemented by the addendum, "though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of [the Ranch]" and "meets all the requirements for the 'detailed statement' required by NEPA . . . ." 364 F.Supp. at 842. Furthermore, the court determined that the Secretary's substantive commitment decision was neither arbitrary nor capricious nor an abuse of discretion since "HUD has complied with the goal of NEPA, . . . by '[using] all practicable means, consistent with other essential considerations of national policy' to carry out our nation's environmental policy." 364 F.Supp. at 844.

Plaintiffs attack these findings, contending that (1) the agency's offer of commitment to the developer was in violation of HUD regulations and Council on Environmental Quality guidelines since it was extended before the thirty-day period for circulation of the impact statement for public comment had expired; (2) the final statement and addendum

are unacceptable because both were improperly delegated to and represent the work product of the developer and his experts with little independent analysis or input from HUD and because the offer of commitment was not withdrawn pending completion of the additional environmental studies; (3) the supplemented final statement does not measure up to the requirements of NEPA; and (4) HUD's decision of commitment is arbitrary and capricious since it gave insufficient weight and consideration to environmental factors. In related contentions, plaintiffs assert that HUD's treatment of alternatives to the proposed project in the statement was deficient and that in accordance with the Urban Growth and New Community Development Act, HUD was obligated to consider and develop the suitability of alternative sites for the project.

To support their first issue—procedural irregularities at the agency vitiated HUD's offer of commitment—plaintiffs point to an October 1971 decision by the Community Development Board of Directors "to authorize an offer of commitment at the earliest appropriate time" and to a "draft" offer of commitment allegedly communicated from HUD to the developer on February 15, 1972, a date well before expiration of the thirty-day statement circulation period required by guidelines of the Environmental Protection Agency, 40 C.F.R. § 6.15 (1973), the Council on Environmental Quality, 40 C.F.R. § 1500.11(b), 38 Fed.Reg. 20556 (1973), and HUD regulations, HUD Handbook 1390.1(5.)(d.)(2), 38 Fed.Reg. 19187 (1973). Furthermore, plaintiffs argue that since the final statement, dated and filed with the Council on Environmental Quality on January 20, was not received until three days later, the February 23 offer of commitment also preceded expiration of the circulation period.

[6] The short answer is that the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA. Sierra Club v. Callaway, *supra*; Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir.

1973). The draft HUD Title VII Regulations, which have never been formally adopted, were uppermost in the minds of the Community Development Board of Directors at their February 15 meeting when they authorized Assistant Secretary Jackson "to determine at the expiration of the thirty-day period whether an offer of commitment should be issued . . . ." More importantly, the record is clear that the February 23 offer of commitment followed the circulation of the impact statement to the Council on Environmental Quality and other public agencies and groups by more than the specified thirty days. Finally, that conditional offer was lawfully issued pursuant to 42 U.S.C. §§ 4513, 4514, and draft HUD regulations. Proposed HUD Reg. § 32.23, 36 Fed.Reg. 14212–13 (1971).

[7, 8] Neither is the commitment offer or the impact statement fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. See Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C)." Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmen-

tal functions and participate actively and significantly in the preparation and drafting process. *See* Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). HUD did no less here.

Non-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch application. To this end an inter-disciplinary team of New Communities Development staff members prepared and compiled each of the three environmental statements after independently reviewing data, information and comments provided by the developer's experts and other interested public agencies and groups. To obtain further verification, HUD retained a geologist and his staff of three associates to supervise and analyze the supplemental environmental studies and review every aspect of the project, especially the water quality monitoring program and the proposed environmental controls. His report and favorable conclusions were included with those studies in the addendum prepared by the New Communities Development staff.

[9–11] In the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy, cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. This does not mean it may substitute the applicant's efforts and analysis for its own. The guidelines of the Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of impact statements clearly contemplate submission of initial environmental information by the applicant to the agency. *See* EPA Reg., 40 C.F.R. § 6.21(c) (1973); CEQ Guidelines, 40 C.F.R. § 1500.7(c), 38 Fed.Reg. 20553 (1973); *see also* HUD Handbook 1390.1(5.), 38 Fed.Reg. 19184–87 (1973). In view of HUD's active participation and independent preparation of the impact statement and addendum, the district court did not

err when it failed to conclude that the agency improperly delegated its statutory responsibilities to the developer.

Whenever an agency decision to act precedes issuance of its impact statement, the danger arises that consideration of environmental factors will be *pro forma* and that the statement will represent a *post hoc* rationalization of that decision. NEPA was intended to incorporate environmental factors and variables into the decisional calculus at each stage of the process. "This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." CEQ Guidelines, 40 C.F.R. § 1500.7(a), 38 Fed.Reg. 20552 (1973). The impact statement is the central, independent component of NEPA's decision-making methodology since it "provides a basis for (a) an evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 833 (1972).

[12,13] In this case, HUD's draft statement preceded its first significant decision, the October 1971 authorization by the Community Development Board of Directors of an offer of commitment at the earliest appropriate time. However, that the draft and final statement were totally inadequate under NEPA is signaled by HUD's conditioning its offer on a comprehensive study of the recharge zone and on Community Development and Texas Water Quality Board approval of the measures to be instituted to protect the aquifer. The "final" impact statement itself acknowledged the lack of knowledge regarding the effect on the aquifer of storm water run-off, which it identified as the major pollution threat, and called for further investigation before, during and after construction of the Ranch. Because the district court's order holding this litigation in abeyance and the developer's agreement to Hud's call for a moratorium on construction effectively maintained

the status quo pending completion of the August addendum, it was not incumbent on the court below to require that HUD withdraw its commitment. The offer was contingent, stating that the Community Development Board "is under no obligation to enter into a project agreement or to guarantee your debt obligation until and unless" the Board has affirmatively found that each specified condition has been met. Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. The goal of NEPA is a better environment. While formally correct statements and technical compliance with the Act and complimentary guidelines are required, an initial finding of section 102 noncompliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.

[14] As a further point in their multifaceted appellate offensive, plaintiffs contend that the supplemented statement did not comply with section 102(2)(C) because it failed (1) to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; (2) to set out a cost-benefit analysis of the project; (3) to consider cumulative impacts; (4) to discuss adequately the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) to treat fully outside comments and opinions. A cursory examination of the impact statement, addendum and supporting documents demonstrates each of these assertions' lack of substance.

The supplemented statement pointed to statistics indicating continued explosive population growth in the northwest quadrant of Bexar County and the probabilities that the influx of unregulated, low density subdivisions would be accelerated by the expanded network of regional highways and that the

Ranch would tend to attract parasite settlements by as many as 40,000 persons along its outskirts. The statement also warned of the concomitant need for appropriate land use and zoning controls to protect the aquifer from accompanying septic tank discharge and other pollution and to insure that such developments were consistent with the plan, patterns and controls established for the Ranch. The developer promised to cooperate with the Alamo Area Council, the City of San Antonio and the Texas Water Quality Board in establishing the necessary regulatory controls. Moreover, in responding to the district court's order requiring the Edwards Water District and Texas Water Quality Board to file with the court semi-annual reports as to development over the aquifer, its effect and the environmental control measures being implemented, the Water Board indicated that it intended to incorporate virtually all of the HUD requirements imposed on the Ranch into an order regulating all development activities over the aquifer.

[15, 16] Similarly, exhibits in the addendum disclosed the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas. Unavoidable adverse environmental effects, irretrievable commitments of resources and other environmental costs and risks were identified and found not to outweigh the benefits of the Ranch in protecting and enhancing the Ranch site as well as avoiding the onset of urban sprawl. That the factors in this cost-benefit analysis are generally imprecise and unquantifiable does not render the result inadequately detailed. NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Land use regulation over the aquifer was seen to advance its long-run productivity as against the adverse short- and long-term effects of uncontrolled development. Advance planning, careful monitoring of water quality and stringent environmental controls should assure the continued in-

tegrity of the aquifer if such measures are extended throughout the recharge zone. Finally, all comments received as to each statement during the circulation period were attached and included in the supporting documentation. Many of the responses to the draft statement and HUD's replies thereto are reflected in the two succeeding statements.

"NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its action which would reduce environmental damage." Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (1971). In its discussion of alternatives, HUD proposed (a) taking no action, (b) requiring actions of a substantially different nature that would provide similar benefits with varying environmental impacts and (c) approving a project of different size, scope or design with less significant environmental impacts. The no action alternative was unattractive since anticipated uncontrolled development over the recharge zone posed a greater threat to the aquifer. Just as adverse impacts could not be avoided by refusing financial assistance to the Ranch, neither could they be precluded by delaying the project 3 to 5 years until proposed but unenacted state or federal land use legislation might result in a comprehensive plan for the recharge zone. The second alternative encompassed approving the project on a site off the recharge zone. This proposal was discarded because it would produce the same adverse environmental results as no action and would not satisfy the demand for housing in the northwest quadrant of Bexar County. Approval of a project smaller in scope or of less costly design on the Ranch site under the third alternative would not provide the housing necessary to accommodate most of the area's potential residents. Neither would it incorporate the economies of planning and funding to be found in a larger project nor exert such a beneficial influence on the surrounding area.

Asserting that HUD's discussion of alternatives is conclusory, superficial and self-serving, plaintiffs contend that the

impact statement is fatally deficient because it fails to mention the acquisition of the recharge zone as a park or game preserve, the modification or elimination of federal assistance programs so as to discourage development over the recharge zone, the development of a different type or design of new community in another area of Bexar County, or any consideration or development of alternative sites for the project off environmentally sensitive areas. In a related contention, plaintiffs argue that Title VII, which is a guidepost for application of NEPA in this urban-suburban setting, compels HUD to consider alternative locations for new communities in evaluating an application for Title VII assistance.

[17, 18] It is true that the scope and extent of HUD's treatment of alternatives was less than exhaustive. Its sufficiency under NEPA, however, must be judged in light of the nature of the federal action and the underlying implementing federal legislation. The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide, *see* Natural Resources Defense Council, Inc. v. Morton, *supra*. Nevertheless, compliance with the NEPA command that an agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332(2)(D), must be judged against a rule of reason. "There is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Life of the Land v. Brinegar, *supra*, 485 F.2d at 472.

[19, 20] In this light the statement cannot be condemned for its failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. Furthermore, HUD's Title VII responsibility is limited to

approving or disapproving, in accordance with the statute's provisions, new community applications. Although the Act permits HUD upon specific authorization of the President "to plan and carry out large-scale projects" on federally owned lands to demonstrate the development of and serve as models for new communities, 42 U.S.C. § 4524, this statutory authority does not obligate the agency to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counter-proposal of its own before it can pass on the merits of a properly submitted new community application. "There can be no merit to plaintiff's claim that HUD cannot approve an otherwise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

[21] None of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII. Absent a competing applicant, HUD's prerogatives ultimately consisted of accepting or rejecting the application before it. The impact statement explored the consequences of both courses of action. If HUD is to discharge fully its Title VII and NEPA duties, it must also review the available alternatives in planning, design and placement of a new community. The impact statement adequately discussed these aspects of the Ranch. When the statement is read with its supporting documentation, it furnishes sufficient information "to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, *supra*, 458 F.2d at 836. Since the statement was not deficient in approach and reflected a basis in good faith objectivity, we hold that it fully complied with NEPA.

[22] Finally, plaintiffs assert that the Secretary's substantive decision to approve federal assistance to the developers of

the Ranch gave insufficient weight to the environmental risks inherent in constructing a city of 88,000 persons over an area supplying water to more than 1,000,000 residents. The environmental studies indicated that domestic sewage, solid waste, accidental spills of dangerous liquids and storm water run-off posed the greatest threats to the integrity of the aquifer. The district court summarized well the pervasive measures required by HUD to protect the water quality of the underground reservoir. It suffices to refer the interested reader to that cogent exposition with the observation that the precautions taken clearly supported the court's determination of their adequacy. Sierra Club v. Lynn, *supra*, 364 F.Supp. at 843.

Should it be discovered that pollutants have escaped the surface controls and threaten the aquifer, the developer must take remedial action, including installing an impervious lining in drainage channels over the 161 acres of land identified as especially porous. Any remedial action is subject to HUD and Texas Water Quality Board approval. The project agreement makes it the developer's legally enforceable duty to comply with all present and future environmental quality standards. The developer has agreed to undertake measures to minimize soil erosion and control of sediment and water run-off during the construction phases. To effectuate its duty of quality control and inspection of public improvement construction projects, the developer in conjunction with the City of San Antonio, the Texas Water Quality Board and the Texas State Department of Health has agreed to create an environmental committee, an architectural review board and to employ an independent inspection agent, whose reports will be available to all public and other regulatory agencies. We view the efforts expended to protect the aquifer as substantial and apparently efficacious. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Water Pollution Prevention and Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92–500, 86 Stat. 816, 33 U.S.C. § 1251 et seq., in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end the administrator of the Environmental Protection Agency is directed, in cooperation with other federal, state and local agencies, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve . . . the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a). The Act provides for federal and state enforcement of effluent limitations to be prescribed and of a discharge permit system. 32 U.S.C. § 1319. Unless in compliance with the provisions of the Act, "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311.

The district court concluded that plaintiffs had failed to state a claim under the Water Pollution Control Act because (1) this record does not reflect that the Environmental Protection Agency had established any water quality standards for the court to enforce, and (2) the scheme of environmental controls imposed should prevent any Ranch polluted water from reaching the aquifer. In this court, arguing from the dual premises that the Act establishes a federal policy of nondegradation of the Nation's surface and ground water supplies and that either the Ranch or the "parasite" developments it will attract in adjacent areas will inevitably result in the degradation of the aquifer, plaintiffs contend that HUD's loan commitment violates the duty imposed on the agency by

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33 U.S.C. § 1368(c). This section provides in pertinent part that "[i]n order to implement the purposes and policies of this chapter to protect and enhance the quality of the Nation's water, the President shall . . . cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities. . . ." In Executive Order No. 11738, 38 Fed.Reg. 161 (1973), the President subsequently mandated that "each Federal agency empowered to extend Federal assistance by way of grant, loan or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Federal Water Pollution Control Act . . . ."

[23] In the absence of evidence that the Ranch will pollute the aquifer and degrade established standards of water quality or that HUD's loan commitment contravened its duty to effectuate the Federal Water Pollution Control Act, we affirm the district court's determination that plaintiffs have failed to state a claim for violation of that Act. As the court below stated, the record is silent as to standards of water quality for the aquifer prescribed by the Environmental Protection Agency. It is undisputed that the developer must meet any state or federal water standards that may be established in the future. More importantly, the developer must act to prevent the Ranch from degrading the existing water quality in the aquifer. If the Ranch is discovered to be polluting the underground water supply, the developer has the legally enforceable duty to remedy the situation.

IV.

Attorneys' Fees

Convinced that this litigation, instituted by the plaintiffs as "private attorney generals," had advanced the public interest

by ensuring that adequate precautions would be taken to protect the aquifer and by effectuating important congressional policy, the district court awarded plaintiffs 20,000 dollars in attorneys' fees, costs and expenses. Only the developers were cast in judgment for this award since HUD and Secretary Lynn were immunized by statute. *See* 28 U.S.C. § 2412. Plaintiffs appeal from the award as inadequate. The developer cross-appeals from the award as improperly assessed against it. We reverse on the cross-appeal.

"The so-called 'American Rule' governing the award of attorneys' fees in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)." F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., — U.S. —, —, 94 S.Ct. 2157, 2163, 40 L.Ed.2d 703 (1974). Plaintiffs recognize that neither NEPA nor Title VII provide for the recovery of attorneys' fees. They had no contractual agreement with HUD or the developer concerning attorneys' fees.

The "American Rule" has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., *supra*, —— U.S. at ——, 94 S.Ct. at 2165 (footnotes omitted).

The power to award attorneys' fees in the absence of statutory or contractual authorization is rooted in the inherent power of a federal court to do equity in the face of "overriding considerations." *See* Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Clearly, no such considerations within the ambit of the first two exceptions to the American Rule exist in this case. It would be improper to punish the developer or HUD, either as unsuccessful litigants, or for bad faith, vexatious or obdurate conduct in their defense of the action. Inapplicable also is the "common fund" or "common benefit" exception, which is founded on the unjust enrichment rationale that the entire class benefited by a plaintiff's efforts should share the cost of litigation. It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit. *See* Hall v. Cole, *supra*; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). None of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer. The common benefit rationale could justify an award against a public agency or private entity which would be able to shift the costs in common to the members of the public who draw their water from the Edwards Aquifer. Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source.

The present case is almost identical to The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), petition for cert. filed, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1974). There the District of Columbia Circuit invoked the third exception to the American Rule to award attorneys' fees to plaintiff citizen groups who had acted as private attorney generals in litigation which, while not obtaining the ultimate

relief sought, did act as a catalyst to effect a change that served the public interest. The litigation had blocked construction of the Trans-Alaska Pipeline until Congress subsequently enacted specific legislation permitting construction. One-half of the plaintiffs' attorneys' fees were assessed against Alyeska Pipeline Service Co., the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA. The court reasoned that since "Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees." 495 F.2d at 1036 (citation omitted). The fees were arbitrarily halved and Alyeska was assessed one half. Since collection from the government was barred by statute, plaintiffs were required to absorb the other half. While Alyeska's participation in litigation that would have been finally adjudged improper but for congressional intervention might be cited as a distinguishing feature, the basic thrust of the majority position in the D. C. Circuit supports the action taken by the court below.

[24] We decline to follow *The Wilderness Society.* This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing.[6] In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

[25] It would be inequitable to assess attorneys' fees against the private developer in this case. Granting that plaintiffs performed a valuable public service in bringing this

6. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); 493 F.2d 765 (5th Cir. 1974) and Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), relied upon by the district court, are not to the contrary.

action which directly caused HUD's full compliance with NEPA on the Ranch project, it cannot be gainsaid that HUD was the only party that had breached a duty.[7] Congress directed the environmental obligations of NEPA against federal agencies alone. HUD was solely responsible for the initially deficient impact statement. The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." 364 F.Supp. at 848.

The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

V.

Retention of Jurisdiction

In entering judgment for the defendants, the district court retained jurisdiction over this action for the purpose of ensuring future compliance with the safeguards imposed on the Ranch's development; monitoring the development of areas adjacent to the Ranch and new measures which may be taken to protect the recharge zone; and acting as a central depository and public information source for all future written materials relating to compliance with HUD's requirements. The Texas Water Quality Board and the Edwards Underground Water District were ordered to file semi-annual reports on the extent and effect of development over the recharge zone and the measures instituted for protection of the aquifer, as well as the status of legislation, proposals and plans to protect remaining portions of the recharge zone outside Bexar Coun-

7. Because plaintiffs were unsuccessful in their other claims of statutory violations, only NEPA compliance is pertinent.

ty. 364 F.Supp. at 846. We find no constitutional basis to support this continued exercise of federal judicial power.

[26] Federal courts are empowered under Article III of the Constitution to rule only upon an actual "case or controversy." *See, e. g.*, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). With the rendition of a definitive judgment for defendants on the merits of each of plaintiffs' claims, affirmed by this court, the litigable aspects of the dispute are at an end unless further appellate proceedings are undertaken. The issues capable of judicial determination have been resolved; the rights and duties of the parties have been adjudicated.

[27, 28] The district court must abjure the role of a quasi-administrative agency for environmental affairs in Bexar and other affected counties. No evidence whatsoever indicates that HUD will fail to discharge faithfully its statutory functions. *See* SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). No analogy properly can be drawn here to civil rights or school cases in which the litigation proceeded against a background of a long history of purposefully unlawful conduct. *See, e. g.*, Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). If any defendant should be asserted to be acting in breach of its duties under HUD's commitment or the law, the present plaintiffs or others who may be affected are free to file another action based upon such asserted malfeasance. Of course, the judgment and grant of relief disposing of the litigation, could have compelled the parties to file in a convenient local public office such reports as they may in the future make that contain material of public interest. The court may so modify its judgment upon remand.

[29] However, although "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . . ," United States v. Concentrated Export Assn., Inc., 393 U.S.

199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), federal jurisdiction must be founded upon at least a "mere possibility [of recurrence] which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The record here discloses only the most speculative of possibilities that plaintiffs will find it necessary in the future to invoke judicial guidance of HUD's activities. As of today they can demonstrate no legal injury sufficient to present an actual case or controversy. *See* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There no longer remains any unadjudicated claim upon which relief can be granted. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). "A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court." Alabama ex rel. Baxley v. Woody, 473 F.2d 10, 14 (5th Cir. 1973). In sum, we find on this record no jurisdiction to retain jurisdiction.

VI.

Conclusion

The judgment appealed from is affirmed except as to the award of attorneys' fees and the retention of jurisdiction. The cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Appendix B

United States District Court,
W. D. Texas,
San Antonio Division.

Civ. A. No. SA72CA77.

SIERRA CLUB et al., Plaintiffs,

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, et al., Defendants.

July 17, 1973.

On Motion for Reconsideration

Aug. 21, 1973.

OPINION AND ORDERS

SPEARS, Chief Judge.

Plaintiffs, four citizen groups (the Sierra Club, the Citizens for a Better Environment, the League of Women Voters of the San Antonio Area, and the American Association of University Women, San Antonio Branch) and their individual members, filed suit against James T. Lynn, Secretary of the United

States Department of Housing and Urban Development (HUD), and San Antonio Ranch, Ltd., alleging that the development of San Antonio Ranch New Town (SAR), a proposed Title VII new community to be located in northwest Bexar County, Texas, and partially financed by $18,000,000 in bonds guaranteed by the United States, would violate the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C.A. § 4501 et seq. Subsequently, the Edwards Underground Water District (EUWD) and Bexar County, Texas, intervened on behalf of the plaintiffs, and the Texas Water Quality Board (TWQB) intervened on behalf of the defendants. During the trial, EUWD amended its original complaint, alleging that the development of SAR also would violate the Water Pollution Prevention and Control Act of 1972 (Water Pollution Control Act), 33 U.S.C.A. § 1251 et seq.

The proposed site for SAR is located in the northwest quadrant of Bexar County, approximately 20 miles from downtown San Antonio, 10 miles from the South Texas Medical Center, and 6 miles from the University of Texas at San Antonio. SAR will cover 9,318 acres and have an ultimate population of 87,972 people living in 28,676 housing units. Development is to be staggered in 5-year phases over the next 30 years. When completed, the land-use will break down as follows: residential, 45% (25% of which will be low and moderate income housing); retail 2%; industrial 13%; open space 24%; technical center, 5%;

roads, 7%; schools, 4%. The site is presently in a virtually undisturbed natural condition. Fifteen percent of the acreage is basically flat with agriculturally productive soil; 85% is located in the Texas Hill Country, an area characterized by rocky soil with elevation differentials of from 100 to 200 feet.

At the outset, this Court feels that the parameters set out in its Order of January 23, 1973, with regard to the scope of review of the administrative decision in this case, bear reiteration; (1) This Court recognizes that it "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971); (2) Limitation number one will not, however, prohibit this Court from making a "substantial inquiry," based upon "a thorough, probing, in-depth review" of the Secretary's decision. Id. at 415, 91 S.Ct. at 823. In other words, no matter what this Court may think of the decision of the Secretary on the merits, it is not empowered to overrule that decision unless the decision is found to have been made in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In conducting this review, numerous pre-trial conferences were held, nine days of testimony, comprising 1,920 pages of transcript, were heard, and three environmental impact statements, as well as seven volumes of HUD's administrative record were reviewed.

As a result of the review process, this Court has already held its orders of January 23, 1973, March 7, 1973, and May 21, 1973, *inter alia,* that:

(1) Plaintiffs have standing to sue. See Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

(2) This Court has jurisdiction.

(3) The scope of review, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), involves a determination of whether the decision by the Secretary of Housing and Urban Development was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(4) In reaching a decision as to whether or not the Secretary's decision was arbitrary, etc., the facts would be assembled in a hearing more nearly resembling a trial *de novo* than a substantial evidence proceeding, and the Court would make a "substantial inquiry" based upon a "thorough, probing, in-depth review" of the Secretary's actions. See *Overton Park,* supra; Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

(5) All relief prayed for by the plaintiffs, except attorneys' fees, was denied.

The purpose of this Opinion is merely to recite the facts supporting the Court's conclusions previously entered and, where appropriate, to expand the reasoning behind those conclusions. Nothing stated herein is to be construed as in any way modifying this Court's past actions.

I Applicability of Title VII to SAR

A reading of the legislative history of Title VII reveals that Congress was attempting therein to treat the multi-faceted problem of urban development known as "urban sprawl." It indicates that Title VII "would provide for the development of a national urban growth policy to encourage and support the more rational and orderly growth of the Nation's communities." U.S.Code Cong. and Adm.News, 91st Cong., 2d Sess., at 5582, 5586 (1970). In attempting to reach this goal, Congress recognized a need to encourage the building of new communities by helping the private sector overcome the traditional barriers to a new community development, i. e., the problems of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors. Id. at 5587. The assistance provided by the Government, and administered by the Community Development Corporation, is in the form of a guarantee that the bondholders will receive a return of their investment in the event of default by the developer.

Congress set out the eligibility requirements for a new community loan guarantee in 42 U.S.C.A. § 4513. In determining that SAR was eligible for such assistance, HUD spent two and one-half years, from February, 1970, until November, 1972, reviewing the project plans. A review of the testimony of Anthony P. DeVito, chief of physical and social planning for the Office of New Community Development (NCD),

reveals that the following process, in skeletal form, occurred over the two and one-half years. A confidential meeting, exploratory in nature, between the developer and members of NCD, was held on February 20, 1970. The developer then prepared a "preapplication proposal" which generally outlined the project and its major problems, and submitted it to NCD on March 16, 1970. Subsequently, having received an invitation to make formal application, the developer formalized a final land, social and community plan which he submitted to NCD, along with $10,000, on November 12, 1970. From then until August, 1971, a full review was undertaken by NCD, in which the opinions of many local governmental agencies were sought. Three Environmental Impact Statements were later issued (September 13, 1971; January 20, 1972; and August 24, 1972), and the offer of commitment was made on February 23, 1972, the date this suit was commenced.

After reviewing all of the evidence, HUD concluded that SAR was eligible for new communities assistance, because, pursuant to § 4513(a)(1), it would provide "an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment." HUD considered the fact that the northwest quadrant of Bexar County was growing at a rapid rate, and would continue to so grow; especially given the proximity of the University of Texas at San Antonio, and the South Texas Medical Center. In addition, it was found that the

Alamo Area Council of Governments (a sixteen-member, multi-governmental agency), the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that SAR was consistent with the comprehensive regional plan. Finally, the undisputed evidence reflected that neither governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County. This last finding was indeed significant, for as a result of the lack of planning, disorderly growth would probably continue to accelerate at a rapid rate for at least the next decade.

Plaintiffs complain bitterly that SAR is ineligible for Title VII assistance because HUD did not adequately consider alternative sites (this argument is separate and distinct from the similar allegation that, under NEPA, alternatives must be discussed in the Environmental Impact Statement). This Court finds nothing in Title VII, nor in its legislative history, that requires HUD to seek out alternative developers or large tracts of land for possible new community development. Title VII requires HUD to approve or disapprove applicants for assistance pursuant to 42 U.S.C.A. § 4513, and it cannot approve a new community which it determines falls outside the guidelines established by Congress. There can be no merit to the plaintiffs' claim that HUD cannot approve an other-

wise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site. In addition, insofar as this litigation is concerned, plaintiffs have failed to show that there are any alternative sites that would meet all the other eligibility requirements of Title VII in the San Antonio area.

Pursuant to the above, this Court holds that HUD made neither an arbitrary nor capricious decision, nor one that constituted an abuse of discretion, nor one that otherwise was not in accordance with law, when it found, with respect to SAR that:

(1) The project will provide an alternative to disorderly urban growth;

(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;

(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;

(4) It is consistent with comprehensive physical and social planning;

(5) It has received all governmental reviews and approvals required by State or local law;

(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;

(7) It makes substantial provision for housing within the means of persons of low and moderate income;

(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and

(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.

In conclusion, it should be noted that, as SAR represents the only community with land-use controls within the recharge zone of the Edwards Underground Reservoir, the vital source of water for the City of San Antonio, it represents an extremely vital vehicle to capture and control growth in a very sensitive geological area. The project will prove to be an alternative to the uncontrolled urban sprawl that will most probably emanate from the University of Texas at San Antonio and its environs if SAR is prohibited from being completed. Hopefully, the project may serve as a model for future urban development in the San Antonio area.

II Applicability of NEPA to SAR

There is no doubt that HUD's action in approving the SAR project comes within the ambit of "major federal actions significantly affecting the quality of the human environment," 42 U.S.C.A. § 4332(C), thereby subjecting such action to the requirements of NEPA. HUD has made a loan guarantee of $18,000,000 for a new community proposed to be located on a portion of the recharge zone of the Edwards Aquifer, an underground water supply constituting the sole supply of water for the City of San Antonio. It is the plaintiffs' contention that, due to the potential hazard of polluting this water supply, a worse site for a Title VII new community in the San Antonio area could not have been chosen.

To better understand the nature of the lawsuit, a brief description of the geology in the area is required. The independent geologist employed by HUD to study the environmental impacts of SAR described the aquifer as follows:

> The term "Edwards Aquifer" has been used . . . to designate a section of Lower Cretaceous rocks from which moderate to high quantities of ground water have been produced in the past. Nearly all the earlier reports mention it as Edwards and Associated Limestones. [Dr. Sergio] Garza (1966) states [that it] "—includes Georgetown, Edwards, and Commanche Peake limestones." The Edwards Aquifer is the principal source of ground water from Bracketville, Texas, on the west, [through San Antonio and New Braunfels,] to San Marcos, Texas, on the east.

The aquifer region covers about 3.5 million acres, with a width of from 5 to 45 miles and a length of approximately 175 miles.

Ground water is found under two sets of conditions within the aquifer, depending upon which side of the Balcones Fault Zone it is located. Northwest of the fault, the "upthrown" side, where the limestone is honeycombed with many vertical and horizontal cracks, ground water occurs under normal, unconfined ground-water table conditions. Southeast of the fault line, the "downthrown" side, the water is located in an underground reservoir; i. e., the water occurs under confined or artesian conditions. As a result of the vertical fault, the rocks on the southeast side of the fault zone were down-dropped and the Edwards Aquifer is found overlain by rocks of younger age and of lower permeability, causing the confining condition.

The fault zone crosses the SAR site, at what is known as the Haby Crossing Fault, in basically an east-west direction, leaving approximately 7000 acres to the north and 2000 acres to the south. The ground-water conditions on SAR are no different than those described for the rest of the aquifer.

It is estimated that the artesian section of the aquifer (i. e., the reservoir from which San Antonio draws its water) has an average annual recharge of about 500,000 acre feet. Three sources of this recharge are generally recognized. The first, and least signficant, is the recharge from rain falling directly on the exposed limestone (i. e., the "outcrop" area)

in the upthrown region. Rain falling on the outcrop seeps down through the honeycombed passages in the limestone, and eventually filters its way into the reservoir. The second source, from which a majority of the recharge takes place, occurs where surface streams transverse the Balcones Fault Zone, and the water enters the aquifer through fractures (i. e., either faults or joints). There are 14 of these major stream beds that flow across the fault zone, none of which is found on the SAR site. The third form of recharge is the underflow in the reservoir from one area to another. The flow of water on the downthrown side is southerly, while the ground-water movement on the upthrown side is principally from west to east.

With the passage of NEPA, a national policy was established to encourage productive and enjoyable harmony between man and his environment. 42 U.S.C.A. § 4321. Suits brought to enforce this policy are usually three-tiered, and based upon the language found in 42 U.S.C.A. § 4332(C). The first two issues present ordinary questions of law, while the last presents a question of fact reviewable pursuant to the Administrative Procedure Act. First, there is the threshold determination of whether or not it is necessary to file an Environmental Impact Statement. See Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). As there have been three Environmental Impact Statements filed in this case, the question need not be explored by this Court. The second issue presents a check list, i. e., whether all the components required by 42 U.S.C. § 4332(C)(i)-(v) have been included

within the Environmental Impact Statement. Finally, having determined that a sufficient statement has been filed, was the determination by the federal agency to proceed with the project arbitrary, etc?

(A) *Is There A Sufficient Environmental Impact Statement?*

The evidence shows that upon learning the proposed SAR site was above the aquifer, HUD took steps to insure that the quality of the water would be protected. The developer was required to retain a geologist to review the project. As comments from the Draft Environmental Impact Statement were returned to HUD, it became apparent that many people were concerned over the possible adverse environmental aspects of the project. The Water Quality Advisory Review Board, composed of 18 public agencies who volunteered to review the water aspects of the project, was established, and functioned from April 24, 1972, until June 23, 1972, by holding four separate public meetings. The comments of these 18 agencies were forwarded to HUD for consideration. HUD required the developer to again have the Texas Water Quality Board review the project, and on June 28, 1972, that agency gave its approval. In addition, as indicated, HUD retained its own independent geologist to review the project independently, and he approved the project.

HUD also secured comments upon the three Environmental Impact Statements, as required by 42 U.S.C.A. § 4332. Comments by 13 public agencies

were sought on the Draft Environmental Impact Statement of September 13, 1971. Of those agencies, 7 filed written comments with HUD. In addition, 9 other public agencies and citizen groups volunteered comments upon the Statement. These comments were reviewed and attached to the Final Environmental Impact Statement of January 20, 1972, which was circulated for review among the 16 organizations which commented on the Draft Statement. Finally, the Addendum to the Final Environmental Impact Statement of August 24, 1972, was circulated among 38 public agencies and groups for comment.

Five areas of concern which must be adequately covered in the Environmental Impact Statement are delineated in NEPA, 42 U.S.C.A. § 4332(C)(i)-(v). These five areas are covered adequately in the Addendum of August 24, 1972.

First, there is an analysis of the environmental impact of HUD's proposed action. As recognized in the statement, the project will result in the conversion 9,318 acres of virgin land to a planned new community which provides housing, community facilities, employment centers, and other amenities. By careful planning, damage to the environment will be minimal. There is a discussion of the natural characteristics of the SAR location, including an analysis of the soils, proposed storm drainage facilities, existing topography and vegetation, the climate, the wildlife and plants unique to the area and plans to preserve them, archeological sites in the project area, and SAR's water supply.

Second, the adverse environmental effects which cannot be avoided are recognized. As stated above, since the site is presently in a natural state, construction will inevitably change some of the site's current elements. Paving will increase the runoff of diffused surface water, thereby reducing retained soil moisture. On the site there will be an increase in noise levels, the number of automobiles, thermal emissions, and the amount of wastes to be disposed. Also, there is the possibility that the development of SAR may affect surrounding areas, by attracting construction on adjacent property.

Third, the alternatives to the proposed action are discussed. These include taking no action, the selection of an alternative site, and the use of the same site for a new community with a different design.

Fourth, the relationship between short-term uses of the environment, and the maintenance and enhancement of long-term productivity are discussed.

Fifth, the irreversible and irretrievable commitments of resources as a result of the project are designated.

In the opinion of this Court, the Environmental Impact Statement, though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of SAR. This is especially true if one reads the 67 exhibits, consisting of *inter alia,* maps, letters and reports, which comprise appendices A and B. Thus, the Environmental Impact Statement will serve the purpose

for which it was required. As it was compiled by NCD, it shows that that agency gave thought to the environmental factors involved in this project. The Statement also meets the requirment of being a full disclosure of the environmental facts. See Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). In addition, it "represents an accessible means for opening up the agency decision-making process and subjecting it to critical evaluation by those outside the agency, including the public." Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972). Therefore, this Court holds that the Addendum to the Final Environmental Impact Statement, issued August 24, 1972, meets all the requirements for the "detailed statement" required by NEPA, 42 U.S.C.A. § 4332(C).

(B) *Was the decision of the Secretary in violation of the Administrative Procedure Act?*

Having decided that the Environmental Impact Statement meets the requirements of NEPA, the Court must answer the question of whether or not the decision by the Secretary of HUD was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). It is the position of the plaintiffs that the decision was arbitrary, etc., because the Secretary "has taken and is in the process of taking actions . . . which violate the National Environmental Policy Act by failing to protect the Edwards Underground Water Reservoir and thereby the water supply of San Antonio from the risk, and indeed likelihood, of pollution. . . ."

The studies conducted by HUD, as well as those conducted by the developer, reveal that the proposed site for SAR does not lie upon any major recharge point for the Edwards Aquifer. In fact, most estimates place the recharge occurring from the SAR property at 0.5% of the total annual 500,000 acre feet of recharge to the entire aquifer. The highest estimate this Court has heard was 1.0%. Only 13% of annual rainfall on the SAR site ever reaches the aquifer. The other 87% is either consumed by vegetation, evaporated directly, or removed from the site as surface run-off. Notwithstanding such minimal recharge from the site, however, HUD has still seen fit to require that an elaborate water control and monitoring system be established by the developer. To design this system, detailed studies were made and independently reviewed to determine the present contents of the water in the aquifer. Then, an appropriate urban area was studied in order to better anticipate the quality of the urban water run-off after the completion of SAR. Finally, scientific projections were made to determine the effects of such urban run-off on the aquifer.

After the studies were completed, a complete system of control and monitoring was established, not only to maintain present water quality, but also to effectively monitor future water quality, so that corrective measures could be taken were it discovered that some pollution was seeping into the reservoir. Extensive measures have been set up to retard any pollution from seeping below the surface. First, there will be an extensive street sweeping program. It was esti-

mated at the trial that through the use of modern vacuum sweepers approximately 90% of the contaminants which accumulate on the streets could be removed by this process, and that this reduction should make the urban street run-off comparable to the storm water run-off occurring on the site today. In addition to the street sweeping, six inches of top soil will be required to be spread on all lawns in SAR. This soil should serve to "leech out" approximately 99% of the pesticides and herbicides which will be used at SAR, especially since the deed restrictions will require that a urea-type fertilizer shall be the only type of fertilizer allowed on SAR. All solid wastes will be collected and removed from the recharge zone. There will also be regulations requiring the use of double tanks for any storage of petroleum products in the area, and the sewer pipes utilized will be of a very high quality, and unlike most anywhere else in the United States, be inspected for leaks after two years, and then again after five. Within the sensitive recharge area, no leakage will be permitted, as the pipe will be laid inside another concrete pipe. Outside the recharge area there will be a maximum test leakage rate allowable of 250 gallons per inch diameter per mile per day, which is to be contrasted with a 500 gallon leakage rate that was originally recommended by the Texas Board of Health. Although it is not contemplated that the pipes will ever leak at the allowable rate, as the rate is determined under pressurized conditions and the system to be employed at SAR will be based upon gravitational pull, it should be noted that, even were the maximum leakage rate occurring (i. e., 200,000 gallons per

day) it would only be equivalent to the waste produced by the 400 cattle currently grazing on the SAR site.

To insure that the controls are working the developer will employ an elaborate water monitoring system. There will be a surface water monitoring system consisting of five permanent monitoring stations, two or three 'grab sample" points, and two or three lawn sampling points. From this initial gathering, the quantity and quality of surface water will be determined as it is entering the limestone. The second level of water monitoring will consist of nine wells strategically placed on the upthrown side of the SAR site. The sampling of this well water will determine whether or not pollutants are getting by the initial controls. Finally, there will be three wells located just south of the Haby Crossing Fault which, due to their large draw-down cones, should sample most of the water entering the artesian section of the aquifer from SAR. This water monitoring system has been approved by the city engineer of San Antonio, the Texas Water Quality Board, the State Health Department, and the geologist retained by HUD.

Through the enforcement of the above mentioned controls, this Court finds that HUD has complied with the goal of NEPA, as stated in 42 U.S.C.A. § 4331, by "[using] all practicable means, consistent with other essential considerations of national policy" to carry out our nation's environmental policy. It surely cannot be said, in light of the above, that the Secretary's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III. Applicability of the Water Pollution Act

On the seventh day of trial, Plaintiff-Intervenor Edwards Underground Water District (EUWD) was granted leave to file a trial amendment which added as a cause of action the alleged violation by SAR of the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C.A. § 1251, et seq. In general, the amendment claims that the development of SAR will cause the pollution of navigable surface waters, as well as ground waters in the Edwards Reservoir. Although there has been no evidence introduced as to the presence of any navigable waters in the area of SAR, there is ground water at the site; therefore, EUWD's complaint must be considered. For the reasons that follow, this Court finds absolutely no merit to the claim that the development of SAR will violate any provision of the Water Pollution Control Act.

The purpose of the Act, as indicated by the legislative history, U.S.Code Cong. and Adm.News, 92d Cong., 2d Sess. at 3668-3834 (1972), is to establish the means whereby comprehensive programs for water pollution control may be developed and implemented by the Environmental Protection Agency. As stated in the history, Id. at 3758.

> The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound; detailed

> information on the costs which will be associated with the later stages of the control program, and allow subsequent Congresses to evaluate the success of the policy enunciated in this bill.

Under the bill, standards may be established for the maximum level of pollution allowable in interstate waters, and once the standards are set up, legal action may be taken to enforce them against the polluters. Id. at 3671. As no evidence was introduced at this trial indicating what standards, if any, have been established by the Environmental Protection Agency, this Court has nothing to enforce. It should be noted, however, that when the standards have been determined, they will be applicable to SAR, as HUD has required the developer to conform to *any* state or federal water standards which may be established.

If, however, this Court is mistaken in its conclusion that the Act is not presently applicable to SAR, it finds that the development will not discharge toxic pollutants in toxic amounts into the aquifer. One-half of one per cent is the recharge which may be attributable to the SAR site. Through the scheme of controls, none of the water reaching the aquifer region should be polluted. If, however, it is polluted, then the monitoring system which has been established should discover it, and afford ample opportunity to correct it. HUD has required the developer to maintain the *present* water quality in the aquifer. Thus, if the montoring system discovers that pollution is seeping into the aquifer, it will be the duty of HUD to see to it that the seepage is stopped. This Court fails to

see how any act of Congress could improve upon the standards already established by HUD for the protection of the aquifer.

Conclusion

After hearing nine days of testimony and reviewing a stack of documents almost four feet high, this Court is of the firm belief that the development of the San Antonio Ranch new community should not be hindered as long as the controls which have been imposed by HUD are maintained. It is significant that the exacting restrictions placed upon SAR in this case constitute the only meaningful attempt thus far, on the part of *any* governmental agency, to control the use of land over the recharge zone of the Edwards Aquifer. Ideally, of course, it would be much more desirable if all residential and commercial development were prohibited over the entire recharge area, and the land converted into a closely supervised park or wildlife preserve. But unfortunately, there is a serious question whether adequate enabling legislation exists to authorize any governmental agency to effect the remedies needed to accomplish anything of a constructive nature in that regard. If the public could be assured that the remainder of the recharge zone in the northwest section of Bexar County, including that portion to be occupied by the University of Texas at San Antonio and its environs, would be subjected to controls similar to those governing San Antonio Ranch, there would be little or no occasion for the deep concern expressed by this Court during the trial, and shared

by others, for the future purity of the aquifer. Actually, however, as already stated, the portion of the recharge area occupied by San Antonio Ranch constitutes only one-half of one percent to one percent of the total Edwards recharge zone. Unless something is done—and soon—by some responsible agency or agencies to eliminate the pollution in Medina Lake and the various streams presently flowing through the fourteen highly sensitive areas of recharge, it stands to reason that the Edwards Aquifer is doomed, regardless of what happens in the recharge area of San Antonio Ranch. The time for action, rather than words, has long since passed.

Although this lawsuit primarily involved only the portion of the recharge zone to be occupied by San Antonio Ranch, the fact remains that the future of the whole Edwards Underground Reservoir could be at stake, unless adequate controls are instituted for the entire recharge area. Under the circumstances, this Court believes, as have courts in other areas of the law, see, e. g., United States v. Hinds County School Board, 433 F.2d 611, 618-619 (5th Cir. 1970), that it should retain jurisdiction of this cause for such period of time as may be necessary to insure that the safeguards imposed upon the San Antonio Ranch developers by HUD are fully instituted and implemented; that the monitoring procedures adopted are followed meticulously; and that the reports reflecting the status and results of all procedures being utilized are made a matter of public record, as and when they are available. By the same token, and so that any

urban sprawl attributable to the development of SAR in adjacent areas may be readily recognized and evaluated, this Court should be kept advised by the Texas Water Quality Board and the Edwards Underground Water District, on a continuing basis, of the status of any development taking place in the portion of the Edwards Aquifer recharge zone located in Bexar County, including, but not limited to, the San Antonio Ranch and the University of Texas at San Antonio, as well as the immediate and long-range effect of such development upon the recharge zone and the underground reservoir, indicating what measures, if any, are being instituted for the protection of the aquifer, and reflecting the status of any legislation, plans or proposals designed to protect the remaining portions of the recharge zone lying outside Bexar County, Texas.

Accordingly, it is Ordered that:

1. Judgment be entered in favor of defendants, HUD and SAN ANTONIO RANCH, LTD.
2. All relief prayed for by plaintiffs and plaintiff-intervenors be and is hereby denied. (See paragraph 5, infra.)
3. The defendant, SAN ANTONIO RANCH, LTD., shall file with this Court, the Texas Water Quality Board, the Edwards Underground Water District, the City of San Antonio, and Bexar County copies of all data and reports required to be supplied to HUD pursuant to the General Development Plan and the project agreement between San Antonio Ranch, Ltd.

and HUD; and HUD shall, in turn, file with the Court, the Texas Water Quality Board, the Edwards Underground Water District, the City of San Antonio, and Bexar County copies of all comments thereon and responses thereto, including any and all suggestions, recommendations, and ultimatums that may be furnished to the developer by HUD.

It is further Ordered that, subject to the further orders of this Court, the Texas Water Quality Board and the Edwards Underground Water District, both of whom are parties to this lawsuit, shall, on or before July 1, 1973, and at intervals of not more than six months thereafter, file with this Court, as well as with the City of San Antonio and Bexar County reports reflecting the status of any development taking place in the portion of the Edwards Aquifer recharge zone located in Bexar County, including, but not limited to, the San Antonio Ranch and the University of Texas at San Antonio, as well as the immediate and long-range effect of such development upon the recharge zone and the underground reservoir, indicating what control measures, if any, are being instituted for the protection of the aquifer, and reflecting the status of any legislation, plans, or proposals designed to protect the remaining portions of the recharge zone lying outside Bexar County, Texas.

MOTION TO AMEND JUDGMENT

Consideration has been given to the motion of James T. Lynn, Secretary of Housing and Urban Development, to alter or amend judgment, in which he com-

plains of this Court's action in retaining jurisdiction over this suit and requiring HUD to file copies of comments and responses relating to the filings made by San Antonio Ranch, Ltd. This Court, however, feeling that full compliance with the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321, is of vital importance to the citizens of this area, and believing that it has full authority to retain jurisdiction for the purposes indicated, is of the opinion that the motion should be denied. See Alexander v. Holmes County Bd. of Ed., 396 U.S. 19, 21, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969); United States v. Hinds County School Bd., 433 F.2d 611, 618-619 (5th Cir. 1970); Holland v. Bd. of Public Instruction, 465 F.2d 370. (5th Cir. 1972).

It is patently obvious that great inconvenience and extreme hardship would be imposed upon the public generally, and upon the agencies involved in this suit, if they were required to individually obtain from HUD the many proposed studies alluded to in the General Development Plan and the Project Agreement, in order to assure themselves that the developer was indeed living up to what it promised to do. As a consequence, it is highly appropriate for this Court to act as a central depository to receive all pertinent material available with respect to any development in the recharge zone of the Edwards Aquifer. In this connection, it is gratifying to note that the developer, San Antonio Ranch, Ltd., as well as the Texas Water Quality Board and the Edwards Underground Water District, have indicated their willingness to comply

with the Court's requirements. Since federal funds are involved, and HUD is a public agency that has voluntarily assumed the obligation to make certain that San Antonio Ranch, Ltd. develops its property over the recharge zone pursuant to law, it should be willing to do no less.

The motion to alter or amend judgment is, in all things, denied.

ORDER GRANTING ATTORNEYS' FEES

This Court has considered the citizen plaintiffs' brief in Support of Attorneys' Fees filed pursuant to this Court's prior Judgment and Order, wherein it was stated,

> This Court is firmly convinced that even though the plaintiffs may have, at this stage, technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening this very valuable natural resourse [*i. e.*, the Edwards Underground Reservoir]. Therefore, if it is appropriate under the law to award attorneys' fees to certain of counsel for plaintiffs in order to compensate them for their services rendered herein, consideration will be given to doing so. Each attorney for plaintiffs is directed to furnish to this Court and opposing counsel, within ten days from this date, a brief setting forth his position in this regard . . . . Defendants shall have ten days thereafter in which to respond.

Having reviewed the facts of this case and the briefs filed, as well as the authorities cited therein, this

Court is now of the belief that attorneys' fees should be awarded to counsel for the citizen plaintiffs and paid by the defendant San Antonio Ranch, Ltd.

Defendant San Antonio Ranch, Ltd. (SAR) argues strenuously that "it is highly questionable whether this Court has the power to impose upon a prevailing adverse party the burden of reimbursing plaintiffs' attorneys' fees . . .". It is SAR's position that, unless the award is provided for by either statute or contract, or unless the circumstances of the case indicate the presence of one of the three "well established exceptions to the American rule" of generally denying attorneys' fees, the award may not be made. This Court is in disagreement with such a hard-and-fast approach.

The three exceptions to the general rule that attorneys' fees are not ordinarily recoverable have been stated recently in La Raza Unida v. Volpe, 57 F. R.D. 94, 96 (N.D.Cal.1972). The first is the "obdurate behaviour" situation wherein the plaintiff is awarded fees because the defendant has been acting in bad faith. See Vaughan v. Atkinson, 369 U.S. 527, 530-531, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). The second general exception is the "common fund" situation which ensures that all beneficiaries to the litigation share in its expense. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Finally, there is the "private attorneys general" situation under which plaintiffs are compensated for ensuring the effectuation of a strong Congressional policy. See Lee v. Southern Home Sites Corp., 429

F.2d 290 (5th Cir. 1970). However, this Court does not believe that a slight deviation from one of the established elements of any of the exceptions would, *ipso facto,* deprive the plaintiffs of an award should the trial court decide that equity dictates the award. The Supreme Court appears to be in complete agreement with this reasoning. As Mr. Justice Brennan recently stated for the Court in Hall v. Cole, 412 U.S. 4-5, 93 S.Ct. 1943, 1945, 36 L.Ed.2d 702 (1973).

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," Sprague v. Ticonic National Bank, 307 U.S. 161, 166 [59 S.Ct. 777, 83 L.Ed. 1184] (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392 [90 S.Ct. 616, 24 L.Ed.2d 593] (1970); see Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 [87 S.Ct. 1404, 18 L.Ed.2d 475] (1967).

After reviewing the facts here, this Court is of the belief that the position of the citizen plaintiffs is analogous to that of a plaintiff in a civil rights suit, wherein it has been concluded that attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial. See Cooper v. Allen, 467

F.2d 836, 841 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 429 F.2d 290, 295 (5th Cir. 1970). In *Lee*, Judge Coleman stated,

> There is ample authority, outside the civil rights area, to support the proposition that the allowance of attorneys' fees and expenses of preparation for trial is in the discretion of the district court *sitting in equity* where exceptional circumstances call for their allowance in order to do justice between the parties, . . . as well as in the more traditional situations where the allowance of attorneys' fees is provided for by statute or contract. . . . In the area of civil rights, many cases have either allowed or implicitly recognized the discretionary power of a district judge to award attorneys' fees in a proper case in the absence of express statutory provision . . . and especially so when one considers that much of the elimination of unlawful racial discrimination necessarily devolves upon private litigants and their attorneys, . . . and the general problems of representation in civil rights cases.

429 F.2d at 295 [citations omitted].

As in the civil rights area, the burden of assuring full compliance with the national environmental policy, as expressed by Congress through theNational Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 et seq., has fallen upon concerned citizens. The mere fact that there is no provision in the statute for the awarding of attorneys' fees will not be viewed as a bar to such an award. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-391, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).

In this case, not only can no specific and justifiable reasons be articulated for the denial of attorneys' fees, but this Court is of the firm belief that equity dictates the award. At the commencement of this suit on February 23, 1972, comparatively little of the information subsequently made public had been made available to the general citizenry. Although the "Final Environmental Statement" was circulated for public comment on January 20, 1972, and HUD's offer of commitment was made on February 23, 1972 (the same day suit was filed), this Court, in its Order To Hold Case In Abeyance of March 14, 1972, saw fit to state as point No. 7,

> In view of the fact that defendants agree that the existing "Final Environmental Impact Statement" is not in truth and in fact a "final" statement as contemplated by law, and that additional information required by law needs to be furnished, there is no necessity for this Court to order that the existing statement be withdrawn, but only to require that any environmental impact statement ultimately relied upon satisfies the requirement of finality as used in the legal sense.

Over the months that followed, many studies and hearings were conducted which inquired into the feasibility of the SAR Project, and what, if any, adverse effects it might have upon the Edwards Underground Reservoir. It was during this period that Dr. Henry V. Beck's "Evaluation of Water Quality Studies on San Antonio Ranch, New Town," a report relied upon heavily by the defendants, was

published, and the studies on storm water runoff conducted by Dr. W. H. Espey, Jr. were performed. In addition, the four meetings of the San Antonio Ranch Water Quality Advisory Review Board were held during the summer of 1972. In light of the reams of material published after this Court's Order of March 14th, it is difficult to conclude that the filing of the suit did not help to ensure that adequate precautions would be taken to protect South Texas' very valuable water resource and that the measures taken would be made available to the scrutiny of the public eye.

Finally, although this Court would like to spread the cost of the award equally between San Antonio Ranch, Ltd., and HUD, it finds that by Congressional mandate it is prohibited from doing so. See 28 U.S. C.A. § 2412.

It is therefore hereby ordered that the citizen plaintiffs recover reasonable attorneys' fees from the defendant San Antonio Ranch, Ltd., the amount of such award to be determined at a hearing to be held on a date to be set after conferring with counsel.

Bexar County and the Edwards Underground Water District have waived any right to claim attorneys' fees, and the Court finds that no attorneys' fees are recoverable against the defendant James T. Lynn, Secretary of Housing and Urban Development.

ON MOTION FOR RECONSIDERATION

On the 21st day of August, 1973, came on to be considered defendant San Antonio Ranch, Ltd.'s motion for reconsideration of the Court's order approv-

ing the award of attorneys' fees, the motion of citizen plaintiffs for continuation or restoration of injunction during the pendency of appeal, and motions by both the citizen plaintiffs and the United States Department of Housing and Urban Development to tax expenses of certain witnesses as costs of court. Having reviewed the facts of this case, in addition to the briefs and affidavits filed, and authorities cited, this Court is of the opinion and finds that attorneys' fees, costs and expenses should be awarded to citizen plaintiffs in the total amount of $20,000.00; that the motion for injunction during the pendency of appeal should be denied; and that the motions filed by plaintiffs and HUD seeking to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses should be denied.

A. Attorneys' Fees

Defendant San Antonio Ranch, Ltd. (SAR) insists that attorneys' fees can only be awarded to a successful litigant. Though the judgment entered in this cause clearly and unequivocally denied all relief sought by the plaintiffs, it does not necessarily constitute the sole basis for determining the success or failure of plaintiffs in bringing this lawsuit.[1] As noted in this Court's order of June 28, 1973, the "final" Environmental Impact Statement filed by HUD on

[1]See Globus, Inc. v. Jaroff, 279 F.Supp. 807 (S.D.N.Y. 1968), where in a stockholders' derivative action based upon misleading use of a proxy statement concerning a stock option, cancellation of the stock option before completion of the suit made the case moot, and yet in the face of the result which plaintiff

January 23, 1972, did not, in truth and in fact, fully comply with the law, though by the time this litigation was completed such compliance had been achieved through further extensive study, research, public discussion, and planning on the part of HUD, as well as many other governmental agencies and private parties. In addition to the public meetings held by the Water Quality Advisory Review Board, composed of 18 public agencies, which resulted in that Board's approval of the project (an action that should have been taken before HUD made its final commitment), the study made by Dr. Henry V. Beck, ("Evaluation of Water Quality Studies on San Antonio Ranch, New Town") was published, as was the study on storm water runoff conducted by Dr. W. H. Espey, Jr. All of these very important events took place subsequent to the filing of this lawsuit. It is almost axiomatic that vital reports concerning the safety of the proposed project could not be evaluated fully by all governmental agencies involved, as contemplated by the NEPA, until they were completed and circulated. As a consequence, from the time the injunction in this case was originally filed to the time the trial was completed, the facts and record had changed so substantially as to make this an entirely different lawsuit. And it should be noted that the direct holding

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requested having been accomplished prior to judgment, his claim for attorneys' fees was still considered.

Several recent articles have examined the awarding of attorneys' fees in environmental litigation. *See, e. g.*, Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U.L.Rev. 301 (1973); Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L.Rev. 1222 (1973).

of this Court in its Memorandum Opinion of July 17, 1973 was "that the addendum to the Final Environmental Impact Statement, issued August 24, 1972, meets all the requirements for the 'detailed statement' required by NEPA, 42 U.S.C.A. § 4332 (C)." The addendum, which included 77 exhibits, amounting to over a foot and a half of papers, was a document far different from the first "final" Environmental Impact Statement. Essentially, the plaintiffs forced heretofore untested hypotheses to be subjected to rigorous study which did in fact reveal the project to be safe, forcing both the government and SAR to do what they should have done of their own initiative in the first place, before the Final Environmental Impact Statement was issued, and turning a preliminary hypothesis as to safety into a much more logical and reasonable conclusion. Prior to the filing of the lawsuit there was no firm assurance that all of the studies eventually done would be done, even under the moratorium imposed by HUD as a condition of their grant.

Defendant SAR maintains that Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), specifically allows only two exceptions to the general American rule denying attorneys' fees under the Court's equitable powers: 1) when an opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons;" and 2) cases in which substantial benefits have been conferred upon members of an ascertainable class, where the court's jurisdiction makes possible an award to spread the costs proportionately

among the members of the class. This Court does not agree with that interpretation. Nowhere in Hall v. Cole does the Court limit the inherent equitable power of the federal courts to award attorneys' fees (specifically noted in the decision) to those situations exclusively. A careful reading of Hall v. Cole would seem to support the conclusion of one observer following the decision in Mills v. Electric Auto-Lite:

> Where previously the courts were led to start with the traditional rule and then ascertain whether the case fell into one of the three *Fleischmann*-approved exceptions, now they are to start with the equitable power of the courts to grant appropriate remedies with the burden on the other side to prove a legislative "purpose to circumscribe the courts' power." 38 Chi.L.Rev. 316 (1971) at 325.

Moreover, in the recent case of Ojeda v. Hackney, 452 F.2d 947 (1972), the Fifth Circuit stated:

> In sum, the equitable propriety of the allowance of any amount of attorneys' fees, and the manner in which those fees, if allowed, are to be collected, is committed entirely to that court's sound discretion . . . (At 948)

Thus even if the judgment in the above entitled case were read as totally unfavorable to the plaintiffs, and resulted in none of the relief which they originally sought, it would still remain within the inherent equitable power of the Court to award attorneys' fees if so prompted by "overriding considerations" indicating the need for such a recovery. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702.

In the instant case these overriding considerations consist of the public service rendered by the plaintiffs, who through this litigation have helped ensure the purity and continued viability of the water in the Edwards Underground Aquifer. Attorneys' fees have been granted many times in the well recognized instances in which plaintiffs have served as "private attorneys general," and are thereafter compensated because their efforts have served the public interest by ensuring the effectuation of a strong Congressional policy. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970). The same holds true in civil rights cases. See Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972). There is no reason why the protection of the public interest in this environmental case should be treated any differently.

The attorney for citizen plaintiffs in the instant case indicated in his affidavit that over 1,185 hours were spent in preparation and trial of this litigation, and all parties stipulated that the time sheets submitted in such affidavit were correct. In this connection, the Court finds that during the period from approximately February, 1972 until October, 1972, the attorney for citizen plaintiffs devoted 210 hours of the time set forth in the affidavit to his representation of Bexar County, a plaintiff which did not request and was not granted attorneys' fees in this Court's order of June 28, 1973. Accordingly, the time spent on behalf of Bexar County will not be considered as a basis for compensation.

The award of attorneys' fees is not intended to make either the client or the attorney whole, nor by

any means fully compensate counsel for the time expended in this extended and complex litigation which has stretched out over a period of a year and a half. The Court does not feel that the minimum fee schedule of the State Bar of Texas may be used as a proper basis for measuring the rate of compensation to be awarded in a case such as this. Nor does the Court find that the fee a practicing attorney would charge a private client, willing and able to pay, to be appropriate in this case. Rather, considering the Criminal Justice Act, and the purposes of that Act, the Court finds that the statutorily enumerated rate of compensation set out in 18 U.S.C. § 3006A(d) (1972), is a reasonable guide for setting compensation in public interest civil litigation. That section provides for compensation at the rate of $30 an hour for time spent in court, and $20 an hour for out-of-court time. As noted by District Judge Frank Johnson: "It is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest." Wyatt v. Stickney, 344 F.Supp. 387, 410 (M.D.Ala.1972). The rates set out by the CJA provide neither unjust enrichment nor undue impoverishment of counsel who commendably bear a large share of the public responsibility of the legal profession.

Having considered the Criminal Justice Act, the approximate number of hours expended in this litigation, plus the complexity and novelty of this case, the skill and outstanding service performed by the opposing counsel, the importance and beneficial result

of this litigation to the public, expenses paid by plaintiffs totalling $2,620.79, costs incurred in securing witnesses, and all the facts and circumstances of the case, this Court finds that $20,000.00 is a fair and reasonable amount to cover the fees, costs and expenses incurred by plaintiffs.

B. Motions to Tax Costs

The Department of Housing and Urban Development requests that certain costs to taxed against citizen plaintiffs, and the citizen plaintiffs request that certain other costs be taxed against the defendants. These motions are made pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1821 and 1920.

(1) Motion by Plaintiffs—

Plaintiffs have asked for a total award of costs in the sum of $968.40 to cover travel and other expenses of certain witnesses. However, in light of the award of $20,000.00 herein made to cover their fees and expenses, plaintiffs' motion should be and the same is hereby denied.

(2) Motion by HUD—

The Department of Housing and Urban Development has requested total fees for travel, subsistence, and attendance of $1,889.60. The Court does not dispute any of the specific costs claimed by defendant, but since, as already indicated, the award of attorneys' fees would have been spread equally between San

Antonio Ranch, Ltd., and HUD, if it were not for the prohibition of 28 U.S.C. § 2414, this Court is of the opinion that it is appropriate under the provisions of Rule 54, Federal Rules of Civil Procedure to deny such costs to HUD.

C. Motion for Continuation or Restoration of Injunction During the Pendency of Appeal

Plaintiffs have alleged in their motion for continuation or restoration of injunction during the pendency of appeal that, absent such an injunction, irreparable damage will be done to the surface cover of the Edwards Underground Aquifer, and that irrevocable financial commitments will be made by HUD and private investors. The allegation of irreparable injury is only one of the four conditions necessary to justify the issuance of an injunction pending appeal. Other requirements are that a party seeking such an injunction must make a strong showing that he is likely to succeed on the merits of the appeal, that no substantial harm will result to the other parties due to the injunction, and that the injunction will serve the public interest. Blackshear Residents Organization v. Romney, 472 F.2d 1197 (5th Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); Fortune v. Molpus, 431 F.2d 799 (5th Cir. 1970); Pitcher v. Laird, 415 F.2d 743 (5th Cir. 1969); Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968).

Not only have the plaintiffs failed to demonstrate that irreparable damage will result if the injunctive

relief is not continued, but this Court does not believe that the record in this case would support a finding that there is a strong likelihood that plaintiffs will succeed in an appeal on the merits. Certainly, it would be the height of inconsistency for this Court to determine after a nine day trial that no irreparable damage to the aquifer will result if the project proceeds, and then enjoin the project because irreparable damage will result if the project is not halted. An injunction in the present case would, in practical effect, award to plaintiffs the identical relief already denied to them on the merits of the case.

However, the Court is of the firm opinion that the lifting of the injunction against further construction should not prejudice the position of either party, nor change the present status of this litigation to the disadvantage of any party. Therefore, it is specifically noted that any future construction, financial or contractual commitments, or progress of any kind or character on the SAR project shall be undertaken at the defendants' own peril. In other words, the denial of plaintiffs' motion for continuation or restoration of the injunction during the pendency of appeal is conditioned upon the premise that no evidence shall be offered, received, or considered at any future proceeding in this cause concerning any development of the project subsequent to this date, whether for the purpose of establishing grounds for equitable relief or otherwise; it being the intention of the Court that any evidence which may be presented at any future hearings or proceedings herein shall be limited to the

stage of development of the project as of March 14, 1972, the date of entry of the original injunction in this case.

It is therefore ordered that:

(1) The motion for continuation or restoration of injunction during pendency of appeal is hereby denied, subject to the condition hereinabove set forth.

(2) Attorneys' fees, costs, and expenses shall be awarded to the citizen plaintiffs in the total amount of $20,000.00 to be paid by defendant, San Antonio Ranch, Ltd.

(3) The motions by plaintiffs and HUD to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses are denied.

Appendix C

United States Court of Appeals

FIFTH CIRCUIT

D W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

November 19, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3378 SIERRA CLUB, ET AL V. LYNN

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Clare F. Sachse
Deputy Clerk

cc: Messrs. George P. Parker, Jr.
John C. Wood
Fred C. Meyers
Mr. Keith Burris
Mr. Bruce J. Terris
Mr. Phillip D. Hardberger
Messrs. Hugh P. Shovlin
William Session
Mr. Seagal V. Wheatley
Mr. M. Lynn Taylor
Mr. Jerry Hill

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Clare F. Sachse
Deputy
New Orleans, Louisiana JAN 1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1024

SIERRA CLUB, CITIZENS FOR A BETTER ENVIRONMENT, AND LEAGUE OF WOMEN VOTERS, *Petitioners*,

vs.

JAMES T. LYNN, Secretary of the U.S. Department of Housing and Urban Development, and SAN ANTONIO RANCH, LTD., *Respondents*.

BRIEF OF RESPONDENT, SAN ANTONIO RANCH, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, San Antonio Ranch, Ltd. (the "developer"), respectfully prays the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners, by their litigation efforts, conferred such a significant benefit upon the consumers of water supplied by the Edwards Aquifer, that they should be rewarded or reimbursed for such efforts.

2. Whether an attorney's fee award can properly be made against a party which did not behave obdurately, cannot spread the costs to the purported bene-

ficiaries of the litigation, and on which no duty was imposed by the statutory provisions under which this case arose.

REASONS FOR DENYING THE WRIT

The decision rendered by the Court below is clearly correct.

ARGUMENT: THE DECISION BELOW IS CLEARLY CORRECT

A.

In United States federal practice, it has long been a general rule that a court will not allow a litigant to recover his attorneys' fees as damages or as reimbursable costs in the absence of specific statutory authority which allows a plaintiff to litigate *qua* private attorney general, or a contract providing therefor. See, e.g., *F. D. Rich Co., Inc.* v. *United States Industrial Lbr. Co., Inc.*, —— U.S. ——, 94 S.Ct. 2157, 2165-2166, 40 L.Ed. 2d 703 (1974); *Hall* v. *Cole*, 412 U.S. 1, 93 S.Ct. 1943, 1945-1946, 36 L.Ed.2d 702 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 625, 24 L.Ed.2d 593 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967). The general rule is not an arbitrary one, but is supported by reason. "In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit. . . ." *Fleischmann*, supra, 87 S.Ct. at 1407.

As part of their "equity jurisdiction," however, federal courts do have power to award attorneys' fees even in the absence of a statutory or contractual provision therefor. See, e.g., *Hall* v. *Cole*, supra, 93 S.Ct. at 1946; *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

While the decision to allow attorneys' fees has been committed to the discretion of the trial court in equity cases, that discretion may not be exercised as a matter of course, but must be exercised in accordance with the admonition of *Sprague* that "such allowances are appropriate only in exceptional cases and for dominating reasons of justice." 59 S.Ct. at 780; accord, *Fleischmann,* supra, 87 S.Ct. at 1407, 1408; *Rude* v. *Buchhalter,* 286 U.S. 451, 52 S.Ct. 605, 607, 76 L.Ed. 1221 (1932); *La Raza Unida* v. *Volpe,* 57 F.R.D. 94, 99 (N.D. Cal. 1972).

The Supreme Court has approved the exercise of this "equity jurisdiction" for only two reasons and by doing so it has developed two well recognized and established exceptions to the general rule. Since neither the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. ("NEPA") nor the Urban Growth and New Community Development Act of 1970, 42 U.S.C. § 4501 et seq. ("the New Community Act") provide and statutory basis for awarding attorneys' fees, and no agreement has been made by the developer to pay petitioners' attorneys' fees, such fees may properly be awarded to petitioners and against the developer in this case only if petitioners established facts to which one or both of these exceptions to the general rule is applicable. See *Henry* v. *Clarksdale Municipal Separate Sch. Dist.,* 480 F.2d 583, 585 (5th Cir. 1973); *Walker* v. *Columbia Broadcasting System, Inc.,* 443 F.2d 33, 37 (7th Cir. 1971); *Kahan* v. *Rosenstiel,* 424 F.2d 161, 174 (3rd Cir. 1970), cert denied, *Glen Alden Corp.* v. *Kahan,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970). This the petitioners wholly failed to do.

B.

An early exception to the rule that was created by equity courts, commonly referred to as the "bad faith"

or "obdurate behavior" exception, provided that a party who suffered a wrong caused by another party's obdurate behavior should not suffer the wrong without a remedy but should recover from the latter party his litigation expense necessary to prove his case. "Equity jurisdiction" is appropriately exercised for the reason that the courts deem it necessary to protect litigants from those who behave obdurately and to punish those who so behave. See, e.g., *Hall* v. *Cole,* supra, 93 S.Ct. at 1946; *Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1309 (2d Cir. 1973). The petitioners have wholly failed to show, and the trial court failed to find, that the developer caused injury to petitioners by behaving obdurately. This exception is therefore inapplicable.

C.

The other exception, heretofore commonly referred to as the "common fund" exception—but now more appropriately referred to as the "conferral of benefit" exception—provides that a party who, by his litigation efforts, confers a significant benefit upon other parties or people should be reimbursed for the expenses he has incurred, the reimbursement to be made either directly or indirectly by those upon whom he conferred the benefit. "Equity jurisdiction" is appropriately exercised for the reason that it would be unfair to the party if he had to bear the entire expense when he received only part of the benefit and that it would unjustly enrich the beneficiaries of the party's litigation efforts if they were benefitted without sharing a proportionate amount of the expenses. See, e.g., *Hall* v. *Cole,* supra, 93 S.Ct. at 1946-1947 n. 7.

The trial court concluded that the petitioners, by commencing and prosecuting this action, (1) created great-

er public awareness of the dangers of pollution threatening the Edwards Underground Reservoir, 364 F. Supp. at 847, and (2) forced HUD to comply with NEPA, 364 F.Supp. at 848-849, 850, and concluded that by doing either one or both, the petitioners conferred a substantial benefit upon the local public, 364 F.Supp. at 847, 850-851. However, the petitioners failed to show, and the trial court failed to find, that petitioners conferred any benefit upon the developer. It is indeed almost axiomatic that petitioners, as parties adverse to the developer would and could not confer any benefit upon it. See *Hobbs* v. *McLean,* 117 U.S. 567, 6 S.Ct. 870, 877, 29 L.Ed. 940 (1886); *Standard Lumber Co.* v. *Interstate Trust Co.,* 82 F.2d 346 (5th Cir.), cert. denied, *Interstate Trust & Banking Co.* v. *Standard Lumber Co.,* 299 U.S. 545, 57 S.Ct. 8, 81 L.Ed. 401 (1936); *Nolte* v. *Hudson Nav. Co.,* 47 F.2d 166 (2d Cir. 1931). Furthermore, the developer employed its own counsel to protect its interests in this litigation and should not be forced to accept the employment of petitioners' counsel as well. See *Haynes* v. *Rederi A/S Aladdin,* 362 F.2d 345, 351 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967). No reason, therefore, exists for forcing the developer to reimburse the petitioners.

D.

While plaintiffs who, by enforcing a significant federal statute, confer a substantial benefit upon others have been reimbursed for their litigation expenses, *Hall* v. *Cole,* supra, 93 S.Ct. at 1947-1948; *Mills,* supra, 90 S.Ct. at 625, 627, the only parties or persons who may be properly forced to contribute to the plaintiffs' litigation expenses are the beneficiaries of plaintiffs' efforts or the representatives of those beneficiaries.

Mills, supra, 90 S.Ct. at 628. Thus, in *Mills* the Supreme Court made the pertinent observation that:

> To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit.

90 S.Ct. at 628; accord, *Gerstle* v. *Gamble-Skogmo, Inc.,* supra, 478 F.2d at 1308-1309; *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.,* 143 U.S. App.D.C. 90, 442 F.2d 812, 823 (1971); *Kahan* v. *Rosenstiel, supra,* 424 F.2d at 166-167; *Jones* v. *Uris Sales Corp.,* 373 F.2d 644, 648 (2d Cir. 1967); *Baltic Ind. Sch. Dist. No. 115* v. *South Dakota H. S. Activities Ass'n,* 362 F.Supp. 780, 786 (D.S.D. 1973); *Atwood* v. *Kerlin,* 169 F.Supp. 135, 139 (S.D.N.Y. 1957), aff'd on other grounds, 264 F.2d 4 (2d Cir. 1959), cert. denied, 361 U.S. 817 (1959); see *Hall* v. *Cole,* supra, 93 S.Ct. at 1948; *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 459 (2d Cir. 1974); *Natural Res. Def. Coun., Inc.* v. *E.P.A.,* 484 F.2d 1331 (1st Cir. 1973); *Ojeda* v. *Hackney,* 452 F.2d 947, 948 (5th Cir. 1972) (per curiam). This observation is even more appropriate in this case than in *Mills* because the developer was a prevailing party and not a wrongdoer. Even assuming the District Court's findings were supported by evidence and its conclusion that the petitioners conferred a "substantial" benefit upon a segment of the public was made by a proper application of the law thereto, if for that reason equity jurisdiction had been properly exercised by the District Court, it would still not have afforded a basis for forcing the developer to reimburse petitioners but would only have afforded a basis for

forcing reimbursement from either the public who benefitted from petitioners' efforts or a party or parties who exist to serve or represent the interests of all those purportedly benefitted. In the present case, reason would only support an award of attorneys' fees against HUD, Edwards Underground Water District, or Bexar County, or any of them. These entities stand here in the same relation to the taxpaying public as did the corporation in *Mills* to its shareholders, and the union in *Hall* to its members. To allocate petitioners' attorneys' fees among them would be to spread them ultimately among that part of the taxpaying public which purportedly received substantial benefits from this litigation. *Natural Res. Def. Coun., Inc.* v. *E.P.A.*, supra, 484 F.2d 1331; accord, *Gilpin* v. *Kansas State H. S. Act. Ass'n, Inc.*, 377 F.Supp 1233, 1244-1253 (D. Kan. 1973); cf. *Incarcerated Men Of Allen County Jail* v. *Fair*, 507 F.2d 281, 285 n.2, 286, 287, 289; *McLaurin* v. *Columbia Municipal Sep. Sch. Dist.*, 478 F.2d 348, 354-355 (5th Cir. 1973). Contra, *Brewer* v. *School Board of City of Norfolk, Va.*, 456 F.2d 943, 951-952 (4th Cir. 1972), cert. denied, 406 U.S. 933, 92 S.Ct. 1778, 32 L.Ed.2d 136 (1972); *Ojeda* v. *Hackney*, supra, 452 F.2d 947; *La Raza Unida* v. *Volpe*, supra, 57 F.R.D. at 101. See *Bradley* v. *School Board of City of Richmond, Va.*, 53 F.R.D. 28, 35-36 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Sovereign immunity, however, prevents the imposition of an award upon HUD, 28 U.S.C. § 2412, but it does not prevent any such imposition upon agencies or subdivisions of a state, such as a county. *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1358 n.12, 39 L.Ed.2d 662 (1974).

E.

If, however, an award of attorneys' fees is to be made as a means of implementing public policy, and such award is to be made against adverse parties without regard to whether or not they have behaved obdurately or have received any benefits from plaintiffs' efforts, as the District Court indicated in its exposition of its ground for the award, the award must be authorized by statute. *Bradley* v. *School Board of City of Richmond, Va.*, 472 F.2d 318, 328-331 (4th Cir. 1972), vacated on other grounds, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Woolfolk* v. *Brown*, 358 F.Supp. 524, 537 (E.D. Va. 1973). See also, *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civ. Serv. Com'n*, 497 F.2d 1113, 1115 n.2 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3282 (No. 74-543, November 5, 1974). As previously stated, Congress has made no provision for such award in cases arising under NEPA or the New Communities Act. Congress, by specifically authorizing awards of attorneys' fees in cases arising under other federal statutes, and by not so authorizing in cases arising under NEPA or the New Community Act, clearly indicated that insofar as these Acts are concerned, it does not authorize the sanction of attorneys' fees as a matter of course against defendants in actions arising thereunder. The doctrine of *expressio unius est exclusio alterius* applies in this case and should be dispositive of the District Court's conclusion. See *Kemp* v. *Beasley*, 352 F.2d 14, 23 (8th Cir. 1965). Therefore, awards may be made to plaintiffs and against defendants only for the two reasons previously discussed.

The District Court cited as authority for its conclusions the cases of *Lee* v. *Southern Home Sites Corp.*,

444 F.2d 143 (5th Cir. 1971) (429 F.2d 290) and *Cooper* v. *Allen,* 467 F.2d 836 (5th Cir. 1972). The *Lee-Cooper* equity standard should be applied against adverse parties, however, only when the plaintiff seeks to vindicate *clear rights* by litigation which has been made necessary only because of the obdurate conduct of the defendant. See, e.g., *Johnson* v. *Combs,* 471 F.2d 84, 87 (5th Cir. 1972), cert. denied, 413 U.S. 922, 93 S.Ct. 3063, —— L.Ed.2d —— (1973); *Local 149 I.U., U.A.A. & A.I.W.* v. *American Brake Shoe,* 298 F.2d 212, 216 (4th Cir. 1962), cert. denied, 369 U.S. 873, 82 S.Ct. 1142, 8 L.Ed.2d 276 (1962); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 919, 93 S.Ct. 3048, —— L.Ed.2d —— (1973). Otherwise, the penal character of such an award against a defendant such as the developer quite overwhelms the remedial character whether or not the court intends to punish the defendant. Thus, the application of the *Lee-Cooper* equity standard would unjustly punish the developer for fairly and successfully defending itself from claims asserted against it by the petitioners.

Nevertheless, assuming that the *Lee* and *Cooper* cases are of broader scope, it would still be grossly unfair to impose upon the developer, a private party defendant, the burden of paying the petitioners' attorneys' fees in a case arising under NEPA because the petitioners had no cause of action against this defendant whatsoever. *Biderman* v. *Morton,* 497 F.2d 1141, 1146-1148 (2d Cir. 1974); *Tanner* v. *Armco Steel Corp.,* 340 F.Supp 532, 538-539 (S.D. Tex. 1972); *Natural Res. Def. Coun., Inc.,* v. *T.V.A.,* 340 F.Supp. 400, 407-408 (S.D.N.Y. 1971), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972); *Atlanta Gas Light Co.* v. *Southern Natural Gas Co.,* 338 F.Supp. 1039, 1050 (N.D. Ga.

1972); *Committee To Stop Route 7* v. *Volpe,* 4 E.R.C. 1681 (D. Conn. 1972).

Thus, in *Committee To Stop Route 7* v. *Volpe,* the court, though deciding it was proper to exercise "equity jurisdiction" to award attorneys' fees to plaintiffs for reasons similar to those given in *Lee* and *Cooper,* concluded that it would be unfair, and refused, to force a party who had no duty under NEPA to pay the plaintiffs' fee, stating:

> There remains the question of whether it would be fair to award attorney's fees against the state defendants, who do not have the insulation of Sec. 2412. The Act is a mandate for federal agencies. It is their action that must meet certain statutory standards. While the action of a federal agency is often taken in cooperation with a state agency, the entity primarily responsible for the 'major Federal actions' for which the Act requires impact statements is the federal agency. 42 U.S.C. Sec. 4332(2)(C). . . . In these circumstances it would not be appropriate to impose attorney's fees as a cost upon the state. . . .

Therefore, whether or not this Court ever decides to extend the application of the *Lee-Cooper* equitable standard to cases arising under NEPA, it would still be clearly unfair and improper to exercise equity jurisdiction to force a defendant such as the developer to pay any recovery by petitioners, especially where, as in this case, the private defendant successfully defends itself from claims brought against it by petitioners.

CONCLUSION

For the reasons stated herein, Respondent San Antonio Ranch, Ltd. respectfully prays the Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

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